No. 84-277

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE BOARD OF TRUSTEES OF THE VILLAGE OF SCARSDALE and THE VILLAGE OF SCARSDALE,

Petitioners,

—vs.—

KATHLEEN S. MCCREARY, DAVID DRABKIN, ANN F. CAWLEY, ANGELINA J. MESSINGER, EDWARD R. NAPOLITANO, CHARLES E. BUTLER, JOHN D. HAWKINS, NANCY G. STEGER, RICHARD CACCIATO, CAROL ANN PASCAL, MARTY T. THOMPSON and GREGORY DE SOUSA,

and

THE SCARSDALE CRECHE COMMITTEE, PATRICIA CURRAN, CYNTHIA BARSUHN, GRACE FELLOWS, DORIS ADLER, MARY TULLY, JOAN MANN and MARIA PEDULLA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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95 pp

QUESTIONS PRESENTED

In *Widmar v. Vincent*, 454 U.S. 263 (1981), this Court held that the University of Missouri had violated the Free Speech Clause when, on the stated basis of the Establishment Clause, it denied use of university facilities ("a forum generally open for use by student groups") to students desiring use of those facilities for religious worship and religious discussion. *Lynch v. Donnelly*, 104 S. Ct. 1355 (1984), held that the City of Pawtucket, Rhode Island, had not violated the Establishment Clause of the First Amendment when it included a crèche in a display on private land that also contained a Santa Claus house, a Christmas tree and other figures and decorations. The questions presented by this case are:

(1) Whether a municipal governing board, having refused to allow a crèche to be placed in a small public park, should be compelled under the rule of *Widmar v. Vincent* to allow placement of the crèche in the park for the approximately two weeks of the Christmas season.

(2) Whether *Lynch v. Donnelly* shows that the board would not violate the Establishment Clause if it authorized placement of the crèche in the park.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
1. The Facts	2
2. The Decision of the District Court	9
3. The Decision of the Court of Appeals	11
REASONS FOR GRANTING THE WRIT	14
CONCLUSION	25
APPENDIX:	
Opinion of the United States Court of Appeals for the Second Circuit (June 21, 1984)	1a
Opinion of the District Court (December 8, 1983)	26a

TABLE OF AUTHORITIES

Cases:	PAGE
Abood v. Detroit Board of Education, 431 U.S. 209 (1977)	17, 19
ACLU v. Rabun County Chamber of Commerce, Inc., 678 F.2d 1379 (11th Cir. 1982), *modified and aff'd*, 698 F.2d 1098 (11th Cir. 1983)	15, 22-23, 23 n.8
Board of Education v. Allen, 392 U.S. 236 (1968)	12 n.6, 20
Bob Jones University v. United States, 103 S. Ct. 2017 (1983)	20
Buckley v. Valeo, 424 U.S. 1 (1976)	16, 19
Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961)	23
CSC v. Letter Carriers, 413 U.S. 548 (1973)	19
Clark v. Community for Creative Non-Violence, 52 U.S.L.W. 4986 (U.S. June 29, 1984)	18, 19
Cohen v. California, 403 U.S. 15 (1971)	17
Elrod v. Burns, 427 U.S. 347 (1976)	19
Evans v. Newton, 382 U.S. 296 (1966)	23
Everson v. Board of Education, 330 U.S. 1 (1947)	12 n.6, 20
FCC v. League of Women Voters, 52 U.S.L.W. 5008 (U.S. July 2, 1984)	16, 18
Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982)	16
Lehman v. City of Shaker Heights, 418 U.S. 298 (1974)	16, 20
Lemon v. Kurtzman, 403 U.S. 602 (1971)	9-10, 12, 24
Leutkemeyer v. Kaufmann, 364 F. Supp. 376 (W.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974)	20

PAGE

Lynch v. Donnelly, 104 S. Ct. 1355 (1984) ..... *passim*

Marsh v. Chambers, 103 S. Ct. 3330 (1983) 12 n.6

Members of the City Council v. Taxpayers for Vincent, 104 S. Ct. 2118 (1984) 15, 19, 22

Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) 15, 16, 19, 23

Monell v. Department of Social Services, 436 U.S. 658 (1978) 6 n.3

Monroe v. Pape, 365 U.S. 167 (1961) 6 n.3

Norwood v. Harrison, 413 U.S. 455 (1973) 20

O'Hair v. Andrus, 613 F.2d 931 (D.C. Cir. 1979) 18

Public Utilities Commission v. Pollak, 343 U.S. 451 (1952) 20

Regan v. Taxation With Representation, 103 S. Ct. 1997 (1983) 20

Roemer v. Board of Public Works, 426 U.S. 736 (1976) 12 n.6, 16

Rubin v. Village of Scarsdale, 440 F. Supp. 607 (S.D.N.Y. 1977) 6 n.3

Schneider v. State, 308 U.S. 147 (1939) 15

Shelley v. Kraemer, 334 U.S. 1 (1948) 23

Smith v. Collin, 439 U.S. 916 (1978) 16

Spence v. Washington, 418 U.S. 405 (1974) 16

Stone v. Graham, 449 U.S. 39 (1980) 11, 16

Tilton v. Richardson, 403 U.S. 672 (1971) 12 n.6, 18

United States v. Schwimmer, 279 U.S. 644 (1929) 17

Walz v. Tax Commission, 397 U.S. 664 (1970) 20

PAGE

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) 17

Widmar v. Vincent, 454 U.S. 263 (1981) ..... *passim*

Wooley v. Maynard, 430 U.S. 705 (1977) 17

Zorach v. Clauson, 343 U.S. 306 (1952) 12 n.6

Other Authorities:

Fed. R. App. P. 43(c) 1 n.1

U.S. Const. Amend. 1 2

28 U.S.C. § 1254(1) 2

IN THE

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OCTOBER TERM, 1984

THE BOARD OF TRUSTEES OF THE VILLAGE OF SCARSDALE and THE VILLAGE OF SCARSDALE,

Petitioners,

—vs.—

KATHLEEN S. MCCREARY, DAVID DRABKIN, ANN F. CAWLEY, ANGELINA J. MESSINGER, EDWARD R. NAPOLITANO, CHARLES E. BUTLER, JOHN D. HAWKINS, NANCY G. STEGER, RICHARD CACCIATO, CAROL ANN PASCAL, MARTY T. THOMPSON and GREGORY DE SOUSA,

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Respondents.[1]

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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1 The two groups of respondents brought separate lawsuits, which were consolidated in the District Court and on appeal. The named defendants in the first case, in addition to petitioners herein, were four individual Board members who had voted against respondents' applications to place a crèche or crèches on the public site. By the time of the appeal, three of those Board members had been replaced following expiration of their terms. No formal substitution was made. *See* Fed. R. App. P. 43(c). The Board of Trustees, now seeking certiorari, consists of Mayor Seymour E. Sims and Trustees Martin Bowen, Edward Falkenberg, William R. Glendon, Edward S. Hand, Evelyn H. Seidman and Harriet D. Goldberg. In the circumstances, it has seemed appropriate and sufficient to petition in the names of the Board as such and the Village.

Petitioners, the Board of Trustees of the Village of Scarsdale and the Village of Scarsdale (hereinafter, collectively, "Scarsdale" or "the Village"), respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on June 21, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a-25a) is not yet reported. The opinion of the District Court (App. 26a-61a) is reported at 575 F. Supp. 1112.

JURISDICTION

The judgment of the Court of Appeals was entered on June 21, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States of America, applicable to the States under the Fourteenth, provides in pertinent part:

> Congress shall make no law respecting an establishment of religion . . . or abridging the freedom of speech. . . .

STATEMENT OF THE CASE

1. The Facts

The facts of the case were presented in a detailed stipulation, accompanying exhibits, answers to interrogatories and deposition testimony. They may be summarized as follows:

Boniface Circle is a plot of land in the center of Scarsdale's business district. Its area is about .075 acres. Deeded to the Village as a park in 1931, its surface is mainly grass. It contains

a war memorial erected in 1949, a flagpole, an evergreen tree, dense hedges, two benches, two lamp posts and a walkway. (J.A. 71-72.)[2]

Over the years, almost no physical signs, symbols or other objects have been displayed in Boniface Circle. For several hours one afternoon in 1961, the Community Fund was permitted to launch its drive by placing a model rocket ship there, but was directed to remove that symbol to another public place for the rest of the eight-day drive (J.A. 93). A Scarsdale High School group held a one-day bake sale and art show there in 1971 (J.A. 90). During several Christmas seasons, Christmas lights have been placed by the Chamber of Commerce on the two Boniface Circle lamp posts, on lamp posts surrounding the Circle and on utility poles throughout the Village (J.A. 78-79). In 1982 the evergreen tree in Boniface Circle was similarly decorated by Village employees; in prior years the Board allowed private groups to decorate Christmas trees on other Village-owned property (J.A. 82-83).

Elsewhere on Scarsdale public lands, in addition to Christmas lights and ornaments, permission has been given to emplace such standard objects and symbols as those of the American Red Cross, the Community Fund rocket ship (for eight days), tables and easels for one-day bake sales, carnivals or art sales, United Fund signs, Cancer Committee swords, Boy and Girl Scout model campsites, and some similarly familiar things (J.A. 88-97). With the exception of the crèche involved herein, none of these physical symbols appears from the record to have been a controversial matter.

In October 1957 the Scarsdale Board granted a request by the Scarsdale Creche Committee for permission to place a crèche (about 6′ at its tallest point by 9′ by 3′ in dimensions, App. 29a) in Boniface Circle, to express "the real significance of Christmas time" (J. Ex. 1). Thereafter, similar requests were granted in each year from 1957 through 1980 to have the

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2 "J.A." refers to the Joint Appendix in the Court of Appeals, "J. Ex." to the Exhibit Volume thereto, and "Stip. Ex." to exhibits included in the stipulated materials in the district court record.

Nativity scene on the Circle for about two weeks (J.A. 53-54). With the trivial exception of electricity for a light bulb in some past years, the cost of the crèche and its display has been borne entirely by the Creche Committee (J.A. 56).

At various times public places and facilities have been made available in Scarsdale for religious services and demonstrations by groups of people (as distinguished from symbols like the crèche resting on public land for periods of days or weeks). These have included Christmas carol sings, at which invocations and benedictions have been offered (J.A. 79-81, 83), Memorial Day prayers at Boniface Circle (J.A. 83), patriotic Independence Day speeches (J.A. 84), religious services by groups of various faiths in Village-owned buildings called Wayside Cottage (J.A. 84-85) and the Crossway Firehouse (J.A. 92), and interfaith vigils and demonstrations in various public parks and streets (J.A. 84, 97), as well as church picnics and block parties (J.A. 88). A room in the public library has been used by religious and other groups for speeches, seminars and the display of various articles, some with religious significance (J.A. 86-87). It does not appear that any of these "live" ceremonies or meetings has drawn objection from anyone in the Village.

Almost from the beginning, however, the placement of the crèche at Boniface Circle each Christmas season has evoked protests—sporadic at first, but increasing over time, so that the crèche has been a "hotly contested" issue in Scarsdale in recent years (App. 30a; J.A. 59-66, 69-70). The controversy, recounted in detail by the District Court (App. 30a-38a), began with protests by Jewish organizations in 1960 and 1963 (J.A. 59-60). These objectants deplored "the injection of religious matters in public affairs" (J. Ex. 5) and asserted, *inter alia*, that "many members of the Jewish community believe that their feelings . . . have been disregarded . . . [in] an area involving a great deal of emotion" (J. Ex. 14). The Board of Trustees, among its other responses to the problem, in 1961 created a Special Committee to study it, later enlisted a professor of human relations as a consultant, and, in the late

1970s, solicited the views of the Scarsdale Human Relations Advisory Council (J.A. 59-60, 62). The Advisory Council, in the years 1976-1982, recommended that the crèche be permitted, but urged toward the end of the period that the Creche Committee should preferably use non-public property as its site (J.A. 63). The Trustees similarly, in the years 1979 and 1980, granted the request but (in 1979) "strongly recommended . . . that the Creche Committee consider rotating the creche among various Village churches [which had offered their property for the purpose] in future years" (J.A. 63, 61) and (in 1980) "strongly urge[d] that next year the Committee erect the creche at a location other than Village-owned property" (J.A. 63).

The objections to the crèche over the years came from both Christian and non-Christian residents. As the parties stipulated (J.A. 69):

> Some residents of Scarsdale who are not of the Christian faith are offended by display of the creche on public property because they believe it to favor the Christian religion and to be offensive and hostile to their different beliefs or non-beliefs. Some residents, both Christian and non-Christian, object to the creche because they perceive the placement of this symbol on public property as giving government sanction to, or support and endorsement of, the religious beliefs thus symbolized. Some, both Christian and non-Christian, object because they perceive the creche on public property as mingling government and religion in objectionable fashion.

Other residents, as was also stipulated (J.A. 69-70), supported the crèche and were offended when in 1981 and 1982 the applications to place it in Boniface Circle were denied:

> Some residents of the Village are offended that the Village has denied permission for the erection of the creche at Boniface Circle. Some of those residents view

> the display of the creche at Boniface Circle as a long standing tradition signifying dedication to peace and goodwill among men and women everywhere. Others view the creche as a symbol of the religious aspects of Christmas. Some residents view the Village's denial of permission to erect the creche as a denial of their right to express or receive a Christmas message or as an official rejection of the message which the creche brings to them.

As the level of controversy rose, it led to a lawsuit in 1976 to enjoin the allowance of a crèche on Boniface Circle, ending in a dismissal on a jurisdictional ground that has since become invalid (J.A. 61).[3] Also in 1976, and for the succeeding four years, the Creche Committee was required to display a sign beside the crèche, saying "This creche has been erected and maintained solely by the Scarsdale Creche Committee, a private organization." No dimensions were specified (J.A. 57). The sign used in compliance was visible only from short distances (App. 34a), a condition later deemed by the Court of Appeals to need correction (App. 22a).

1976 was also the year when, as noted above, five churches offered their grounds on a rotating basis as sites for the crèche to avoid the conflict over use of the public site (J.A. 61). Explaining their position, the ten clergymen making the offer issued a statement that said in part (J. Ex. 157):

> In keeping with our respect for one another's beliefs and in keeping with our government's position to protect religious freedom without promoting or restricting particular religious views, we believe that it is inappropriate to use public property to make a religious statement. The freedom here involved is the right of each individual within the community to be assured that no certain

3 *Rubin v. Village of Scarsdale*, 440 F. Supp. 607 (S.D.N.Y. 1977). The dismissal as against the Village was ordered on the basis of *Monroe v. Pape*, 365 U.S. 167 (1961), since overruled in *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

> religious symbol is presumed to represent him on the property which belongs to him in common with the fellow members of his community.

Other Christian clergymen took an opposite stance, supporting the display of the crèche on public land and later decrying the decision not to permit it (App. 33a; J.A. 62).

While permission for placing the Nativity scene on Boniface Circle continued to be granted through 1980, the unanimity of the Trustees on this subject ended in 1973, when one member abstained. The same member abstained in the following year (another being noted as absent). In 1975, there was a repeat of the abstention, while another member voted "Nay." In 1976, there was a "Nay" vote again and two members noted as absent. The "Nays" increased to two in 1978, three in 1980 and a majority of four in 1981 and 1982. (J.A. 55-56.)

As reflected in the votes of the Trustees, the crèche became a political issue. Candidates seeking election declared their positions on the subject (J.A. 98-99, 100). Voters, including a plaintiff-deponent herein, deemed this a material question in considering how to cast their ballots (J. Ex. 191, 306).

Following denial of permission to display the crèche on Boniface Circle in 1981, there was "a small uproar [in the community] . . . which was refueled the following year when the board again voted to prohibit the creche" (App. 34a). Mayor Jean Stone, whose deciding vote defeated the application, received a large volume of mail pro and con. Much of the mail posed the issue as one of Christian versus Jew (App. 34a-35a; J. Ex. 312-16). Writers in this category appeared to assume, incorrectly, that the Mayor was Jewish (App. 34a; J. Ex. 312); a small portion of her mail was "blatantly anti-semitic" (App. 35a).

In November, 1981, after permission had been refused, the Creche Committee accepted an offer from a restaurant across the street from Boniface Circle and erected the crèche there on December 17, 1981 (J.A. 64). After the 1982 denial, the same

offer was made, and some church properties were also made available. These offers were refused, however (J.A. 66-67).

Explaining the reasons for refusing the church locations, the chairperson of the Creche Committee mentioned that some of the properties offered were not centrally located, some presented topographical problems, and some already had crèches. The "first" and "preeminent" reason for this refusal was, however, that this "would destroy the ecumenical aspect of the Creche Committee" (App. 37a; J. Ex. 278). This reflected, as the District Court found, "that a dominant reason why the Creche Committee has wanted the creche at Boniface Circle is because Boniface Circle is *public* land" (App. 38a; emphasis in original).

The denial of the Creche Committee's request for 1982 was voted (4-3) at a special meeting of the Trustees on December 1, 1982 (J. Ex. 80-83). Thereafter, on December 7, 1982, a new group of individuals, which came to be known as the Citizens' Group, filed an application to place a small crèche on Boniface Circle between December 18 and 26, 1982, stating that this "private personal property . . . should not be confused with the Creche owned by the Creche Committee" (J. Ex. 94). Again by a 4-3 vote, this application was denied on December 14, 1982 (J.A. 57).

The minutes of the Scarsdale Board reflect at least two concerns animating those who voted against allowing the crèche on Boniface Circle: (1) the belief, as expressed by clergymen and others, that the Village land should not be used in this way when the symbol thus sited gave offense to substantial numbers of Scarsdale residents, both Christian and non-Christian (J. Ex. 69-70, 72; Stip. Ex. 54); and (2) the essentially legal position that the display over a period of some two weeks would contravene the Establishment Clause (J. Ex. 71-72; Stip. Ex. 54).

On February 7, 1983, the Citizens' Group, which had never displayed its crèche (App. 38a), brought the first of the two actions consolidated herein, seeking, along with other relief, an

injunction to compel permission for placement of their crèche on Boniface Circle (J.A. 2, 7-18). Recalling the purposes of its application to the Village Board, the Group recited their "desires to join in the Village's celebration of 'Christmas' by giving recognition to the birth of Jesus Christ, the occasion and namesake of the holiday, and to celebrate and express religious convictions" (J.A. 15). The Creche Committee filed its complaint on April 28, 1983 (J.A. 6, 27-39).

2. The Decision of the District Court

Having seen that crèches are widely displayed in Scarsdale outside homes and churches (App. 38a), the District Court began its analysis by rejecting the argument of the Citizens' Group that denial of permission for its Nativity scene on Boniface Circle violated the Free Exercise Clause (App. 39a).[4] The Court found "solidly implicated" (App. 39a-40a), however, the plaintiffs' claimed rights under the Free Speech Clause.

Turning to that, the District Court first found that Boniface Circle is "a traditional public forum" (App. 42a), dismissing arguments to the contrary by defendants,[5] and that the denial of the crèche applications was "content-based" (App. 46a). This brought into issue Scarsdale's contention that the denials were justified by a "compelling state interest"— namely, that allowance of the crèche would offend against the Establishment Clause (App. 47a).

Dealing with this argument, Judge Stewart noted at the outset the undisputed proposition that the Nativity scene is a religious symbol (App. 48a). He proceeded then to the lines marked by *Widmar v. Vincent*, 454 U.S. 263 (1981), upon which plaintiffs placed main reliance. Tracking *Widmar*, he pursued the three-pronged analysis of *Lemon v. Kurtzman*,

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4 The argument, eschewed by the Creche Committee, was abandoned by the Citizens' Group as well in the Court of Appeals.

5 These arguments, too, were dropped on appeal.

403 U.S. 602, 612-13 (1971) (App. 50a). He observed in this connection (*id.*) this Court's caution that *Widmar* was to be understood as limited to the particulars of that case, the "basis for [that] decision" being a "narrow" one. 454 U.S. at 273, 277.

In that light, the District Court found the first prong of the *Lemon* analysis—the existence of a valid secular purpose—satisfied in plaintiffs' favor under *Widmar* (App. 51a). As to the concern for "government entanglement," the Judge found the problem "more complex," but concluded that there could not be a finding of Establishment Clause violation "on this ground alone" (App. 51a-52a). The decisive factor amounting to such a violation, he held, was the finding in the circumstances of this case that the two-week sojourn of the crèche on Boniface Circle had a "primary effect" that advances religion (App. 53a).

On this key point, the District Court stressed that religious speakers on the Circle—a rally, a sermon, leafletting—would clearly "run free and clear of the Establishment Clause" (App. 53a). Distinguishing the placement of an unattended symbol from the personal, oral speech in *Widmar*, however, he found that

> when a symbol is placed on public land the land performs an added and enhanced *function*. No longer is the land just a place from which a message can be proclaimed; when a symbol is left on public land the land actually becomes the message bearer. [App. 55a; emphasis in original.]

In determining the effect of a religious symbol "erected and left on public property" (App. 56a), the District Court relied upon this Court's decisions emphasizing the danger in this context of the "appearance" of state sponsorship of religious beliefs or joinder in religious activities (App. 54a-55a). It found the danger realized in this case (App. 56a-58a; emphasis in original; footnotes omitted):

> The record suggests that, in contrast to public gathering uses, people have objected to the creche precisely because an aura of Village approval has adhered to it. Removing this aura of Village approval was the primary concern of the members of Scarsdale's clergy who offered their church properties on an annually rotating basis for display of the creche.
>
> Indeed, cultivating an aura of Village approval is, in our view, one of the factors fueling plaintiffs' desire to have the creche on public property. . . . The Creche Committee has conceded . . . [its] desire to enhance the creche's merely religious message with an 'ecumenical aspect.' . . . Imbuing the creche with an ecumenical appearance . . . would seem to occur *only* if Village land—the property of 'all the people'—is in fact linked in the receiver's mind with the message, since there is nothing inherently ecumenical about the creche standing alone. . . . In contrast to *Widmar*, not only does there appear to be an 'imprimatur of State approval' when the creche sits at Boniface Circle; plaintiffs actually seek it.

The District Court went on to observe that "[t]he advancement problems are not cured by the placement of a sign next to the creche" (App. 59a), referring, *inter alia*, to *Stone v. Graham*, 449 U.S. 39 (1980).

It concluded that the Village was justified in denying both crèche applications "in order to avoid contravening the Establishment Clause" (App. 60a).

3. The Decision of the Court of Appeals

After the decision of the District Court, while plaintiffs' appeals were pending, this Court decided *Lynch v. Donnelly*, 104 S. Ct. 1355 (1984). "Based upon the controlling precedents of *Lynch* and *Widmar*" (App. 2a), the Court of Appeals reversed and ordered a remand.

The Court of Appeals agreed with a number of the District Court's findings and conclusions: that the case involves a "public forum," that the Scarsdale Board's decisions were "content-based," that the Nativity scene is "a form of speech" and that the three-pronged analysis of *Lemon v. Kurtzman* was appropriate for this case. The appellate decision also joined in Judge Stewart's views on two of the three prongs, agreeing that the "secular purpose" factor is satisfied under *Widmar* and concluding, somewhat more strongly after *Lynch*, that the circumstances herein did not disclose the kind of "entanglement with religion" (including "potential political divisiveness") comprising an Establishment Clause violation.

The decisive point of disagreement was the Court of Appeals' conclusion that allowing the Nativity scene at Boniface Circle would not "have the direct and immediate effect of advancing religion" (App. 18a). Reviewing a series of this Court's decisions rejecting attacks on state action under the Establishment Clause (App. 18a-19a),[6] the Court of Appeals applied here the conclusion in *Lynch* that, while there would be an advancement effect, it would be "indirect, remote or incidental" (App. 19a). Referring to both *Lynch* and *Widmar* in this appraisal, the opinion says the result favoring the present plaintiffs follows *a fortiori* (*id.*; emphasis in original):

> [T]he city involved in *Lynch* purchased, erected, displayed, sponsored and owned the creche therein. If the *Lynch* creche was not construed as a primary advancement of religion, *a fortiori*, the Village's neutral accommodation herein to permit the display of a creche in a traditional public forum at virtually no expense to it cannot be viewed as a violation of the primary-effect prong of the *Lemon* test and, therefore, violative of the establishment clause. As the Court noted in *Widmar*,

6 *Marsh v. Chambers*, 103 S. Ct. 3330 (1983); *Roemer v. Board of Public Works*, 426 U.S. 736 (1976); *Tilton v. Richardson*, 403 U.S. 672 (1971); *Board of Education v. Allen*, 392 U.S. 236 (1968); *Zorach v. Clauson*, 343 U.S. 306 (1952); *Everson v. Board of Education*, 330 U.S. 1 (1947).

> religious benefits derived from the use of an open-access forum are incidental, 454 U.S. at 274, and the availability of benefits to a broad spectrum of groups is an important index of secular effect. *Id.*; *Mueller [v. Allen]*, 103 S. Ct. at 3068. Here, there is no doubt that Boniface Circle is *available* to a broad range of Scarsdale's nonreligious and religious organizations, groups and persons.

As to the question of appearance of public support, the Court of Appeals again found the District Court refuted by *Lynch* and *Widmar* (App. 19a-20a):

> [T]he *Lynch* Court indicated that any perception that Pawtucket had aligned itself with the Christian faith by including the creche in its display was not a primary advancement of religion because the benefits conferred in such a situation are indirect, remote or incidental. *Id.* Moreover, *Widmar* stated that 'an open forum . . . does not confer any imprimatur of State approval on religious sects or practices.' 454 U.S. at 274. Under these principles, the Village's actions in permitting access to Boniface Circle for display of a creche—the same actions that would be necessary in permitting access for any display—do 'not lead it into such an intimate relationship with religious authority that it appears . . . to be sponsoring . . . that authority.' *Roemer*, 426 U.S. at 747-48 (footnote omitted).

The Court of Appeals, while caused "to hesitate" over this (App. 20a), found the record inadequate to ground a distinction from *Widmar* on the exposure of children (rather than university students alone) to the Scarsdale crèche. It also disagreed with the District Court's deprecation of the disclaimer sign, holding, however, that the comparatively inconspicuous sign involved here should be dealt with on remand by "an order concerning the size, visibility and message of an appropriate disclaimer sign or signs" (App. 22a). Further, the Court dismissed Scarsdale's argument that *Lynch* was distin-

guishable on the grounds, among others, that the Pawtucket crèche had been emplaced among a variety of non-religious objects and symbols, and was rested on private rather than public land (*id.*).

The Court of Appeals did not treat the District Court's central attention to (1) the difference in this context between live speakers or demonstrators and a controversial symbol standing alone in a public place for a period of about two weeks, and (2) the plaintiffs' insistence upon the public site as a means of achieving the "ecumenical aspect" of the crèche.

REASONS FOR GRANTING THE WRIT

From the decision in *Lynch v. Donnelly* that a municipality *could* in the special circumstances of that case include a crèche for secular purposes in a Christmas display on private land, the decision below proceeds to its holding that Scarsdale *must* allow such a crèche, standing alone, in a small public park at the Village center. The result is reached by marked extensions of both *Lynch v. Donnelly* and *Widmar v. Vincent*.

The main ground of the decision is a remarkable widening of the free speech rule in *Widmar*. Wholly apart from the Establishment Clause, this calls for review by this Court. Under the reasoning and result of the Court of Appeals, an unattended symbol left standing in the park for two weeks is the same kind of "speech" for this constitutional purpose as the oral expressions of people discussing religion or praying. The consequent order compelling Scarsdale to allow erection of the crèche is a dramatic extension of *Widmar*. If the Court of Appeals is correct in this, which we doubt, it justifies sojourns on public sites of hated symbols—swastikas, burning crosses, vulgar political signs—not less than agreeable ones. Right or wrong, it is a sweeping construction this Court should examine before the *Widmar* rule is permitted to be enlarged in this fashion. At a minimum, the Court should consider the conclusion that *Widmar* leaves no room in which local officials may accommodate conflicting views of their residents on acceptable uses of shared property for sectarian or partisan structures or symbols.

Coming to the Establishment Clause question in *Lynch*, the decision below presents additional reasons for certiorari. Significant differences in law and fact—including some specifically noted, without seeming disagreement, in dissent in *Lynch*, 104 S. Ct. at 1370 n.1—distinguish this case from that narrowly confined decision. Moreover, there is a conflict on the question of religious purpose with *ACLU v. Rabun County Chamber of Commerce, Inc.*, 678 F.2d 1379 (11th Cir. 1982), *modified and aff'd*, 698 F.2d 1098 (11th Cir. 1983). These problems alone, and certainly when added to the vital *Widmar* concerns, warrant review by this Court.

1. In holding that *Widmar* governs this case, the Court of Appeals made no analysis of the marked differences between a crèche (or other symbol of emotionally expressive force) standing on the public place for two weeks, on the one hand, and speakers or discussants using the public forum and then departing, on the other. But the distinction between live speakers and a dramatic symbol rested for days or weeks on public land is a wide one. This Court has marked some of the significant differences. The posting of signs and symbols on public property may be barred even for esthetic reasons when a prohibition against speakers or distributors of leaflets could not stand. *Members of the City Council v. Taxpayers for Vincent*, 104 S. Ct. 2118 (1984). The difference between a speaker and a symbol conveying its message steadily from a public site—though both may be broadly "speech"—is notable in law as well as in physical and emotional fact. *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981) ("We deal here with the law of billboards"). It is the difference between an enduring, seemingly impersonal medium, rooted to the place, and conduct that "continue[s] only while the speakers or distributors remain[ ] on the scene." *Taxpayers for Vincent*, 104 S. Ct. at 2131, citing and quoting from *Schneider v. State*, 308 U.S. 147 (1939).

The context in which a symbol conveys its message—including the significant difference between public and private property—may shape meanings in constitutionally vital respects. *See Spence v. Washington*, 418 U.S. 405, 410 (1974); *cf. Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974). The difference is not merely in the quality and duration of the communicative device, but in the profoundly important aspect of *appearance* that has concerned this Court repeatedly in dealing with First Amendment problems. *See Roemer v. Board of Public Works*, 426 U.S. 736, 747-48 (1976); *Stone v. Graham*, 449 U.S. at 42; *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125-26 (1982); *Lynch v. Donnelly*, 104 S. Ct. at 1368-69 (Justice O'Connor concurring); *Buckley v. Valeo*, 424 U.S. 1, 236 (1976) (Chief Justice Burger concurring in part and dissenting in part); *id.* at 262, 265 (Justice White concurring in part and dissenting in part); *FCC v. League of Women Voters*, 52 U.S.L.W. 5008, 5020 (U.S. July 2, 1984) (Justice Rehnquist dissenting). The appearance of public sponsorship or endorsement or approval—carefully appraised by the District Court in this case (App. 53a-59a)—was entirely neglected by the Court of Appeals.

Equating a live speaker with a mute symbol left on the public circle for two weeks, the Court of Appeals committed the error of substituting "traditional labels . . . for analysis." *Metromedia*, 453 U.S. at 517 n.23. In this approach, the fact that a Nazi has a right to speak in a public forum, *cf. Smith v. Collin*, 439 U.S. 916 (1978) (Justice Blackmun, joined by Justice White, dissenting from denial of certiorari), would entail mechanically the right to plant a six-foot square swastika on Boniface Circle for a week or so around the anniversary of Hitler's birthday. No more different from protected "free speech" in its usual, oral signification would be a burning cross to express racist views in a largely black village around the holidays in any of the seven States that officially celebrate Jefferson Davis' birthday, a sign in a park in an upstate New York Hasidic village saying "God does not hear the prayers of Jews," a vulgar denunciation of the draft in terms protected by

Cohen v. California, 403 U.S. 15 (1971), or a sign debating religion by displaying a hammer and sickle and the legend "Religion is the opium of the people." The posited examples are signs or symbols that generate rage rather than "a friendly community spirit of good will," *Lynch*, 104 S. Ct. at 1365, in many people. But the principle of the decision below, rested on the Free Speech Clause, extends, obviously, to "freedom for the thought that we hate," *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Justice Holmes dissenting), no less than to thoughts the majority favors or finds agreeable.

The lower court has made of *Widmar* a means to compel the use of municipal property to make some citizens feel excluded from the shared domain or, what is closely similar, to make some support ideas they find "repugnant to their moral, religious, and political beliefs." *Wooley v. Maynard*, 430 U.S. 705, 707 (1977). This reading of *Widmar* brings it into collision—or, certainly, awkward incongruity—with cherished principles of free expression that include protections against compelled expression.

Building upon the foundation of *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), those principles protect "all the people" against subsidizing or supporting ideas they reject or oppose or find offensive. A union member's dues may not be used in this fashion. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). An appurtenance as routine as an automobile license plate may not be required to bear, against the owner's will, a message as relatively uncontroversial in its literal import as "Live Free or Die." *Wooley v. Maynard*. The dissent in the last-cited case, if less concerned about the license plate, would free the municipal taxpayer from being required to help support a billboard bearing a message to which he or she was opposed. 430 U.S. at 721 (Justice Rehnquist dissenting).

To many citizens, the village park, a special part of home, is not less precious than the license plate or a billboard. The

municipal park is shared property; as one resident said, echoing the law, it belongs to " 'all the people in the Village' " (App. 35a). *See Clark v. Community for Creative Non-Violence*, 52 U.S.L.W. 4986, 4989 (U.S. June 29, 1984) (Chief Justice Burger concurring). A substantial minority—or a majority, as the non-Christians and Christians opposing the crèche appear to be in Scarsdale—might be thought to enjoy the First Amendment's protection against being compelled to support on their shared land (maintained by everyone's taxes) an inanimate symbol steadily conveying for two weeks a religious (or political or other) message they deem exclusionary or hostile or otherwise repugnant. *Cf. FCC v. League of Women Voters*, 52 U.S.L.W. at 5019, 5020 (Justice Rehnquist dissenting); *id.* at 5021 n.3, 5022 n.7 (Justice Stevens dissenting). If that remains to be demonstrated, it is surely not foreclosed by a routine and unexamined reference to *Widmar v. Vincent*.

2. If nothing more, this case poses in sharp outline the question whether *Widmar* must be read to eliminate any possible latitude for municipal officials in resolving substantive conflicts over the uses of municipal sites for signs and symbols. The decision below says, for example, that if the Pawtucket officials involved in *Lynch* had decided *not* to have a crèche on private land, a group of citizens could have gone to court to compel them to allow one in a public park. There is of course no problem at the extremes. It is common ground that Scarsdale could not erect, or allow erection of, a church or a permanent altar in Boniface Circle. *Tilton v. Richardson*, 403 U.S. 672, 683 (1971). It seems equally clear that a religious speaker could appear with a crèche to deliver his or her message, taking the symbol away when the speech ended. *Cf. O'Hair v. Andrus*, 613 F.2d 931 (D.C. Cir. 1979). This case is between those, but, in our view, well on the side taken by the District Court.

On principles reviewed in the preceding paragraphs, those who hold the public places in trust for all "the people," *see*

Clark v. Community for Creative Non-Violence, 52 U.S.L.W. at 4986, are not remitted to a mechanical choice between total prohibition, *Taxpayers for Vincent*, and compelled blanket permission for the use of those places for signs and symbols. In this case, where plaintiffs demand "compulsory subsidization" of their religious views, *see Abood v. Detroit Board of Education*, 431 U.S. at 237, by planting and leaving their crèches in the publicly maintained and supported park against protests of a large segment of those who share the park, petitioners urge that the Scarsdale Trustees could conscientiously and constitutionally refuse to accede. That judgment is or should be among the responsible community choices open to the municipal authorities under "the important powers reserved to the people and the States by the Constitution." *Metromedia, Inc. v. City of San Diego*, 453 U.S. at 569 (Chief Justice Burger dissenting).

Undoubtedly, the drawing of delicate lines on a subject like this one for all imaginable instances is not the work of a single case. *Abood*, 431 U.S. at 236. At a minimum, however, it would seem that limits on symbolic communication, or even on political speech, may properly be allowed in cases where the countervailing interests at stake are themselves of constitutional dimension. *Cf. Buckley v. Valeo*, 424 U.S. 1 (1976); *CSC v. Letter Carriers*, 413 U.S. 548 (1973). This is such a case.

The balance struck by Scarsdale's Village Board was, in our submission, justifiable when viewed against the undisputed facts that (1) many crèches throughout the Village already proclaim the desired message, and (2) even for plaintiffs' crèches, other prominent sites are available, lacking only the desired "ecumenical" effect of the compelled public placement. *Cf. Taxpayers for Vincent*, 104 S. Ct. at 2133 ("nothing . . . indicates that the posting . . . on public property is a uniquely valuable or important mode of communication"). In the circumstances, having in view the Trustees' particular knowledge of "local conditions" and "local options", *Elrod v. Burns*, 427 U.S. 347, 386, 389 n.12 (1976) (Justice Powell

dissenting), the Court of Appeals' decision represents a profoundly dubious ordering of the First Amendment values pressed on both sides of the case.

In the course of striking balances among competing First Amendment concerns, this Court has indicated repeatedly the space that is left for national, state and local judgment between what elected officials *may* do and what they *must* do. Within the "room for play in the joints," *Walz v. Tax Commission*, 397 U.S. 664, 669 (1970), tax exemptions may be given to religious groups, but they do not appear to be compulsory. *Regan v. Taxation With Representation*, 103 S. Ct. 1997 (1983); *Bob Jones University v. United States*, 103 S. Ct. 2017 (1983). That transportation and textbooks may be supplied to parochial school children, *Everson v. Board of Education*, 330 U.S. 1 (1947); *Board of Education v. Allen*, 392 U.S. 236 (1968), does not entail that they must be, *Norwood v. Harrison*, 413 U.S. 455, 462, 469 (1973); *Leutkemeyer v. Kaufmann*, 364 F. Supp. 376 (W.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974). Government owned public conveyances may broadcast some kinds of communications, *Public Utilities Commission v. Pollak*, 343 U.S. 451 (1952), and deny a place for others, especially where permission might trigger "lurking doubts about favoritism." *Lehman v. City of Shaker Heights*, 418 U.S. at 304.

The foregoing comparisons are not perfectly symmetrical. They would seem fairly to recall, however, the relevant need for close and subtle analysis. The testing circumstances of this case present a fitting occasion for clarification by this Court of the principles that should govern the analysis.

3. Reaffirming the necessity for careful "line drawing" in cases of this type, 104 S. Ct. at 1361-62, this Court concentrated on the particular facts in deciding *Lynch v. Donnelly*. *See id.* at 1369-70 (Justice O'Connor concurring, upon "careful judicial scrutiny" of the "unique circumstances"). Significant differences, distinguishing this case, were not adequately appreciated by the Court of Appeals.

— The Nativity scene in *Lynch* was part of a "display" that included a large array of non-religious objects, enumerated by this Court, 104 S. Ct. at 1358, ranging from a Santa Claus house to a teddy bear. This Court's opinion in *Lynch* phrased the problem at least a dozen times as arising from the "inclusion of" or "including" the crèche as one item in a "display" containing the host of merely playful or innocuous figures associated with the secular aspects of Christmas. *See* 104 S. Ct. at 1358, 1362, 1363, 1364, 1365.[7] The Scarsdale crèche, on the other hand, has stood starkly alone in the small (less than one-tenth of an acre) Boniface Circle in the Village center (*see* App. 49a n.14, 60a). As at least four dissenting Justices read the Court's *Lynch* opinion, citing the instant case in the District Court as a comparison, "given the Court's focus upon the otherwise secular setting of the Pawtucket crèche, it remains uncertain whether absent such secular symbols as Santa Claus' house, a talking wishing well, and cut-out clowns and bears, a similar nativity scene would pass muster under the Court's standard." 104 S. Ct. at 1370 n.1. The concurring opinion (*id.* at 1369) concluded that the "display of the crèche in this particular physical setting" was not an endorsement of religion.

— The Pawtucket crèche stood on privately owned land, 104 S. Ct. at 1358, unlike the markedly public Boniface Circle, featuring the War Memorial as its only other structure, to color the "message" of which the land becomes the "bearer"

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7 The majority (*id.* at 1362) and concurring (*id.* at 1369) opinions also emphasized "the overall holiday setting" (*id.*). The signficance of both the narrower and the wider dimensions is a matter for exploration on the merits. For now it seems sufficient, in treating this one among several distinctions, to submit that references to the particular "display" and this Court's repeated enumeration of the many objects cannot be read to have been trivial or immaterial. Compare the observations of the Court of Appeals (App. 23a) that it was "not . . . the physical context within which the display of the creche was situated" but rather " 'the creche in the context of the Christmas season' " (quoting from 104 S. Ct. at 1362) that was decisive in *Lynch*.

(App. 55a). It is the "aura" of the public site that plaintiffs explicitly seek for the impact they deem "ecumenical." In a Village where many crèches on non-public land proclaim the "real significance of Christmas time" (J. Ex. 1), it appears that nothing other than the public mantle makes the public site "uniquely valuable or important" (*Taxpayers for Vincent*, 104 S. Ct. at 2133) for plaintiffs' avowedly identical religious proclamation.

— There was "no evidence of political friction or divisiveness over the crèche in the 40-year history of Pawtucket's Christmas celebration." *Lynch*, 104 S. Ct. at 1365. As a lead plaintiff has acknowledged (J. Ex. 234-35, 251A), the issue has been a fierce one in Scarsdale for years; votes have been sought and cast on this basis (J.A. 98-100; J. Ex. 191, 306); threats and interdenominational rancor have attended the demand that the crèche convey its message on public land in addition to the numerous private sites where crèches abound without dispute or criticism of any kind (J.A. 59-65, 69-70, 98-100, 108-17; J. Ex. 157-206). The record, unlike that in *Lynch*, is replete with what it is permissible to urge "may be evidence that institutional entanglement is excessive or that a government practice is perceived as an endorsement of religion." *Lynch*, 104 S. Ct. at 1367 (Justice O'Connor concurring).

— The Pawtucket case came here after the elected city officials had pursued, and this Court then approved, "legitimate secular purposes" for having the Nativity scene as part of its display. 104 S. Ct. at 1363. Here, there are no similar purposes. The elected officials, far from finding such purposes, have disallowed the crèche on contrary findings. The plaintiffs, demanding the public site, have declared and insisted upon their religious purposes for that mode of assertion (J.A. 15; J. Ex. 325-26, 279).

In this last-mentioned aspect the decision below conflicts with *ACLU v. Rabun County Chamber of Commerce, Inc.*, 678 F.2d 1379 (11th Cir. 1982), *modified and aff'd*, 698 F.2d 1098 (11th Cir. 1983). There, a cross erected in a state park

" 'out of religious stirrings and for a religious purpose' " (*id.* at 1391, quoting the district court, 510 F. Supp. at 891) by the Chamber of Commerce was held to violate the "secular purpose" criterion. "Finding that the *Chamber* [had] failed to establish a secular purpose," 678 F.2d at 1391 (emphasis added), the court held that this amounted to an Establishment Clause violation by state authorities who (somewhat ambiguously) had either approved or failed to disapprove the building of the religious symbol on public property.[8] *Cf. Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Evans v. Newton*, 382 U.S. 296, 301-302 (1966). In light of the profound doubts raised in connection with *Lynch* and *Widmar*, this conflict serves merely as an additional ground (rather than the sufficient ground it might otherwise seem) for the granting of certiorari.

To be sure, the differences between *Lynch* and this case do not necessarily point in a single direction. Arguably, as the Court of Appeals thought (App. 17a), this case may seem less strong for the claim of an Establishment Clause violation because Pawtucket's officials sponsored their Nativity scene while Scarsdale's Board is "merely" being ordered to allow one. It is not necessary for this petition to argue at length for the position that judicial compulsion is not a lesser concern for this Establishment Clause purpose than executive discretion. *Cf. Shelley v. Kraemer*, 334 U.S. 1 (1948); *Metromedia, Inc. v. City of San Diego*, 453 U.S. at 556 (Chief Justice Burger dissenting) ("federal power—this time judicial power—" overriding local authority). It suffices to say that all the other cited differences in the circumstances appear to weigh decidedly on Scarsdale's side.

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8 The Eleventh Circuit's decision came after, and cited (678 F.2d at 1390 n.20), this Court's ruling in *Widmar v. Vincent*. It does not appear, however, that there was an attempt to justify the maintenance of the cross (a permanent structure) as permissible or required under *Widmar*.

The Court of Appeals failed to make the refined factual analysis called for in this and other First Amendment contexts. *See, e.g., Lynch*, 104 S. Ct. at 1361-62; *id.* at 1369 (concurring opinion); *Lemon v. Kurtzman*, 403 U.S. at 625. It ignored entirely the cogent finding that respondents' "ecumenical" objective is revealed as a purposeful use of the public land for the unconstitutional appearance of governmental joinder in or sponsorship of the religious expression. It dismissed too swiftly, especially in light of Justice O'Connor's concurrence, 104 S. Ct. at 1367, the evidence of deep political divisiveness, giving this historically grave concern no weight at all. *Cf. Lemon v. Kurtzman*, 403 U.S. at 622. It confounded the "secular purpose" of Pawtucket with the distinctly different "secular purpose" (allowing use of a public forum) considered in *Widmar*. There is presented in sum a need to clarify *Lynch* itself and, still more pressingly, to review the striking addition by the Court of Appeals, holding that municipal officials are compelled by *Widmar* to allow religious symbols to stand in public places.

CONCLUSION

The case poses challenging and important problems. The Court's resolution of the questions presented will shed valuable light for all branches of government concerned with problems of access to and use of public facilities.

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 1984

APPENDIX

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1071—August Term, 1983

(Argued: April 18, 1984 Decided: June 21, 1984)

Docket No. 83-9052

KATHLEEN S. MCCREARY, DAVID DRABKIN, ANN F. CAWLEY, ANGELINA J. MESSENGER, EDWARD R. NAPOLITANO, CHARLES E. BUTLER, JOHN D. HAWKINS, NANCY G. STEGER, RICHARD CACCIATO, CAROL ANN PASCAL, MARTY T. THOMPSON and GREGORY DE SOUSA,

Plaintiffs-Appellants,

—v.—

JEAN STONE, ELISABETH M. BROWN, EDWARD FALKENBERG, BEATRICE K. UNDERWEISER, THE BOARD OF TRUSTEES OF THE VILLAGE OF SCARSDALE, and THE VILLAGE OF SCARSDALE,

Defendants-Appellees.

THE SCARSDALE CRECHE COMMITTEE, PATRICIA CURRAN, CYNTHIA BARSUHN, GRACE FELLOWS, DORIS ADLER, MARY TULLY, JOAN MANN and MARIA PEDULLA,

Plaintiffs-Appellants,

—v.—

THE VILLAGE OF SCARSDALE and THE BOARD OF TRUSTEES OF THE VILLAGE OF SCARSDALE,

Defendants-Appellees.

Before:

MANSFIELD, PIERCE and PRATT,
Circuit Judges.

PIERCE, *Circuit Judge*:

This is an appeal from a judgment of the United States District Court for the Southern District of New York, Charles E. Stewart, Jr., *Judge*, entered on December 15, 1983, holding that it was "proper" for defendant-appellee Village of Scarsdale ("Village" or "Scarsdale") to deny plaintiffs-appellants' applications to display a creche in a public park during the Christmas holiday season in order to avoid contravening the establishment clause of the first amendment. *McCreary v. Stone*, 575 F. Supp. 1112, 1133 (S.D.N.Y. 1983). The district court's decision was rendered prior to the Supreme Court's decision in another creche case, *Lynch v. Donnelly*, 104 S. Ct. 1355 (1984). Based upon the controlling precedents of *Lynch* and *Widmar v. Vincent*, 454 U.S. 263 (1981), we reverse and remand.

BACKGROUND

In simplest terms, this appeal concerns applications by two groups to place a creche at Boniface Circle, a Village-owned park located in the center of the business district of Scarsdale,

for a period of approximately two weeks during the Christmas holiday season. Plaintiffs-appellants in the first group, twelve in number, are mainly residents of Scarsdale. We will collectively refer to these plaintiffs and other residents who applied to display a creche in Scarsdale on December 7, 1982, as the "Citizens' Group." Plaintiffs-appellants in the second group, seven in number, are either residents of Scarsdale or have a "Scarsdale, N.Y." post office address. They are representatives of plaintiff-appellant The Scarsdale Creche Committee, which is a private unincorported association of seven Catholic and Protestant churches; all of the churches are located in Scarsdale or have a "Scarsdale, N.Y." post office address. Each church contributes approximately twenty-five dollars annually to The Scarsdale Creche Committee to defray the costs of maintaining and displaying one of the subject creches herein. We will collectively refer to these local residents, the churches they represent and The Scarsdale Creche Committee as the "Creche Committee" or as the "Committee."

Scarsdale is a municipal corporation located in the County of Westchester, State of New York. Scarsdale's governing body is known as the Board of Trustees of Scarsdale (the "Board") and usually is elected under a political system known as the Non-Partisan system, in which the Citizens Party nominates candidates for trustees and mayor. The Board governs the affairs of Scarsdale's 17,000 religiously diverse residents.

Among the public properties under the jurisdiction, management and control of the Village and its Board are several parks and other public facilities located in Scarsdale; they include Wayside Cottage, Village Hall, the Scarsdale Public Library, Chase Road Park and Boniface Circle. There are eight "Rules and Regulations Governing Park and Recreation Facilities" that have been in effect in Scarsdale since 1979. These rules state, *inter alia*, that groups desiring use of parks should apply to the Superintendent of Parks, Recreation and Conservation; that groups given permission to use parks should leave them in a clean and orderly condition and will be held responsible for any damage; and that groups using park facilities may be required to obtain public liability insurance. There is no published statute, law, ordinance, rule or regulation in effect

in Scarsdale that requires persons wishing to use Scarsdale's parks or other public properties first to apply for permission from the Board, and there are no published standards upon which the Board bases its decisions to grant or deny applicants permission to use Scarsdale's parks or other public properties. However, Village Code Section 4-1-2 states that "[n]o person shall interfere with, take or use any of the property of the Village without first obtaining the consent of the Village Manager."

It is undisputed that throughout the years covered by this litigation, Scarsdale, acting through its Board, usually granted requests for access to and use of its parks and public properties. Rather than issue a complete denial, on each occasion that it did not grant a specific request, the Board usually chose to approve access to and use of alternative public property. For example, in 1957, the Girl Scouts requested permission to conduct a baked goods sale at Boniface Circle. At the mayor's suggestion, the Board passed a resolution granting permission to the Girl Scouts to use Chase Road for its sale because the Board thought this public location was safer.

It is also undisputed that the Board has granted general use of its parks and public properties for purposes such as speech-making, demonstrating, participating in silent vigils and distributing petitions and other communications. Similarly, the Board has been aware of numerous requests to erect displays on Village-owned property. For example, the Scott Room of the Scarsdale Public Library often has been used for the purpose of exhibiting and displaying articles of an artistic, scientific, literary, civic, cultural, educational or religious nature. Books, miniature military figures, rare stamps and Hanukkah menorahs are among the articles that groups have exhibited and displayed in the library.

Moreover, it is undisputed that Scarsdale has granted access to parks and public properties to groups associated with particular religions. For example, in recent years Scarsdale was aware that Wayside Cottage was the location of religious services by Congregation M'Vakshe Derekh and the Bahai Faith Group. The parties stipulated that the June 23, 1983, edition of the *Scarsdale Inquirer* reported that Congregation

M'Vakshe Derekh was conducting its regular Sabbath services at Wayside Cottage. Wayside Cottage also has been used for a Catholic Mass, a Unitarian wedding ceremony, Bar Mitzvahs and religious services by the Bet Ami Conservative Synagogue. Further, in 1956, the Board granted permission to the Reconstructionist Synagogue of Westchester to use the Crossway Firehouse for the purpose of conducting worship services in September of that year.

Like innumerable local communities, Scarsdale celebrates several holidays during the course of any given year. The holiday that is the center of discussion herein is Christmas. Christmas and Scarsdale's parks and public properties intersect in several ways. For many years, including 1981 and 1982, Scarsdale permitted use of several streets located in the Heathcote, Central Business (which includes Boniface Circle) and Garth Road areas of the Village by the Scarsdale Chamber of Commerce for the purpose of installing and displaying Christmas lights and ornaments. Scarsdale allowed the Chamber of Commerce to display these lights on Village-owned utility poles for approximately one month each year, commencing on or about December 1. Scarsdale also permitted the members of the Chamber of Commerce to broadcast Christmas music in these areas during the time the Christmas lights and ornaments were displayed.

Additionally, for many years, including 1981 and 1982, Scarsdale permitted use of Boniface Circle by the Chamber of Commerce for the purpose of installing and displaying Christmas ornaments for approximately one month each year, commencing on or about December 1, on two lamp posts in Boniface Circle and on the lamp posts directly surrounding Boniface Circle.

In each of the years 1959, 1962 through 1965, and 1968 through 1971, the Village permitted the Town Club, a private group of Scarsdale residents to use Boniface Circle to celebrate Christmas through a Christmas Carol Sing. In 1958, the Town Club held the Carol Sing at Chase Road adjoining Boniface Circle; in 1960, at the public high school in Scarsdale; in 1967, at Chase Road Park. From 1972 through 1981, Scarsdale

permitted use of the plaza outside the entrance to Village Hall, the seat of Scarsdale's local government, for the Carol Sing. Clergymen from local churches offered invocations and benedictions at the Carol Sing in 1959, 1960, 1969 and 1970. In some of the above years, Scarsdale provided Village-owned loudspeakers for use in connection with the Carol Sing, and in 1971, Scarsdale permitted use of platforms from the local high school as well. Also, in some of the above years, the mayor or a member of the Board, upon invitation, attended and welcomed carolers in his or her official capacity. Finally, in 1982, the Village permitted access to Boniface Circle for the Carol Sing. The repertoire of Christmas carols included "The First Noel," "Hark the Herald Angels Sing," "Oh Come All Ye Faithful," "Silent Night," "O Little Town of Bethlehem" and "We Three Kings."

Other examples of Scarsdale's Christmas involvement include allowing Village employees to erect, decorate and display Christmas trees in Village Hall. In 1982, Scarsdale allowed Village employees to install and display Village-owned Christmas lights on the large evergreen tree located in the center of Boniface Circle for approximately two and one-half weeks, and in 1981 and 1982, Scarsdale allowed the Arthur Manor Community Association to install and display Christmas lights and ornaments on a large evergreen tree owned by the Village at Davis Park.

The Scarsdale public property that is central to the dispute herein is Boniface Circle. Scarsdale originally acquired Boniface Circle from the Scarsdale Improvement Corporation in 1931. It is located in the center of the retail business district of the Village and encompasses approximately 3,257 square feet in an oval-shaped configuration. Located inside Boniface Circle is an evergreen tree, approximately thirty-feet tall, two benches, two lamp posts, dense hedges, a walkway and a flagpole at the southern end in an open grassy area. A memorial to the veterans of World War II, which was erected after Board approval in 1947, is located at the northern end of Boniface Circle.

Business and residential properties face Boniface Circle. Among the businesses are restaurants, clothing establishments and a sporting goods shop. Throughout the year, many people frequent Boniface Circle due to its location in the center of Scarsdale's business district.

Beginning in 1956, at the request of four Scarsdale churches, the Board granted permission to place a creche during the Christmas season at Boniface Circle. In 1957, several churches formed the Creche Committee for the purpose of commissioning the sculpting of a wood-carved creche that was to be displayed in Scarsdale during the Christmas season. The completed creche consists of a wooden frame approximately six-feet tall at its peak, dropping off on each end to about three and one-half feet. It is approximately nine-feet long and three-feet deep. An oil painting covers the inside of the frame. Placed inside the wooden frame are nine carved wooden figures that an artist from Scarsdale sculpted at a cost of approximately $1,625. The figures range in height from approximately six and one-half inches to three and one-half feet. When displayed, the figures portray the birth of Christ.

In each year from 1957 through 1982, the Creche Committee submitted a written application to the Board seeking permission to display its creche at Boniface Circle during the Christmas season; from 1957 through 1972, the Board unanimously granted the Committee's applications; from 1973 through 1980, the Board granted the Committee's applications, but minority votes of abstention or denial marked the grants. In 1981 and 1982, the Board voted 4-3 to deny the Committee's requests to display its creche at Boniface Circle.

In each year that the Board granted permission to the Committee to display its creche, the Committee neither solicited nor received any funds or assistance from Scarsdale in connection with the storage, erection, display or removal of the creche. In some years prior to 1977, a 40-watt incandescent light bulb within the creche was connected to a municipal light standard at Boniface Circle. From 1958 through 1980, the Committee restored Boniface Circle to its previous condition after the creche was removed. Until 1980, the Committee's

applications did not specify a duration for the display of the creche. In 1980 and 1981, the Committee requested that the creche be allowed from December 17 to a date of removal "as soon as possible after the New Year." In 1982, the Committee requested the same period, except beginning on December 16. In 1983, the Committee requested permission to display the creche at Boniface Circle during the 1983 Christmas season.

A number of events regarding Scarsdale and the creche began in 1976. First, an attorney and resident of Scarsdale wrote a letter to the Village Attorney indicating that if Scarsdale concluded that the creche could be erected on Village-owned property, he would commence litigation. In December 1976, he did commence an action against Scarsdale and the Creche Committee in the United States District Court for the Southern District of New York seeking a declaration that the placement of the creche on Village-owned property was unconstitutional and an injunction against the Village. The district court dismissed the suit for lack of subject-matter jurisdiction. *Russell v. Town of Mamaroneck*, 440 F. Supp. 607 (S.D.N.Y. 1977) (consolidated with *Rubin v. Village of Scarsdale*).

Also in 1976, the Board, while granting permission to display the creche, required the Committee to display a small unlit sign beside the creche which read: "This creche has been erected and maintained solely by the Scarsdale Creche Committee, a private organization." In each year from 1976 through 1980, the Committee complied with the Board's sign requirement. Moreover, beginning in 1976, four churches that had been members of the Creche Committee since at least 1960 discontinued their representation on the Committee. The membership thus dropped from eleven churches to seven churches.

In 1976, the Board, having established a Scarsdale Human Relations Advisory Council for the purpose of advising it with regard to any human relations problems that might arise in the Village, asked the Advisory Council to give its appraisal as to "how the population of Scarsdale feels about using Boniface Circle for locating the creche." From 1976 through 1978, the Advisory Council recommended that, in the interests of community relations, the Board grant permission to the Committee

to display its creche. From 1980 through 1982, although recommending that the Board grant permission to the Committee to use Boniface Circle, the Advisory Council's reports also stated that the creche should be placed on non-public property and that the Committee should seek other sites.

In 1979, the Board, though granting permission to the Committee to erect its creche at Boniface Circle, stated, "It was strongly recommended by all the Trustees that the Creche Committee consider rotating the creche among various Village churches in future years." In May 1980, members of the Committee met with members of the Advisory Council to discuss and consider possible alternative locations for the creche. They discussed two business-district locations, the Frog Prince Proper Restaurant and the Manhattan Bank for Savings; the Advisory Council later informed the Committee that those locations were not available. Later in 1980, the last year that the Village granted permission to the Committee to erect its creche at Boniface Circle, the Village's letter to the Committee stated that "Mayor Jensen pointed out that in light of the division caused by this issue, the Board strongly urges that next year the Committee erect the creche at a location other than Village-owned property."

As stated, 1981 was the first year that the Board denied the Committee permission to place its creche at Boniface Circle. In November 1981, the Frog Prince Proper Restaurant offered its grounds to the Committee for the display of the creche that year. The Committee accepted the offer and erected its creche there on December 17, 1981.

In March 1982, Committee representatives met with former Mayor Jean Stone, the Village Trustees, Village Manager Lowell J. Tooley, members of the Advisory Council, members of the Chamber of Commerce and members of the Scarsdale Police Department to discuss the concept of "Heritage Plaza." The concept was designed to make an area of public land, after transfer to a private entity, available for displays of a patriotic, ethnic, charitable or religious nature as well as for folk-dancing, singing and other social and cultural activities. The plan later proved unworkable.

At a special meeting on December 1, 1982, after its Law Committee reported with respect to the creche issue and the state of the law that "there is no unanimity among members," the Board again voted 4-3 to deny permission to the Committee to erect its creche at Boniface Circle. On December 7, 1982, seventeen residents of Scarsdale, four of whom are members of the Citizens' Group, submitted an application to the Board seeking permission to display a different, smaller creche at Boniface Circle from December 18 through December 26 during the 1982 Christmas season. On December 14, 1982, the Board voted 4-3 to deny the application.

On February 3, 1983, the Citizens' Group submitted an application to the Board seeking permission to display a creche at Boniface Circle from December 17 through December 26 during the 1983 Christmas season. On February 7, 1983, the Citizens' Group commenced an action in the United States District Court for the Southern District of New York seeking damages, declaratory relief and injunctive relief enjoining Scarsdale and the Board from denying the Citizens' Group access to and temporary use of Boniface Circle based upon the content, nature and purpose of the symbolic speech or expression it sought to present in the public park.

On April 12, 1983, the Creche Committee submitted an application to the Board seeking permission to display its creche at Boniface Circle during the 1983 Christmas season. By letter dated April 21, 1983, Scarsdale responded that the placement of a creche at Boniface Circle was the subject of a pending lawsuit and accordingly it was not appropriate to consider the application at that time. On April 28, 1983, the Committee commenced a separate action on essentially the same grounds as asserted in the Citizens' Group's complaint.

On June 15, 1983, the district court consolidated the two actions for all purposes. On June 21, the district court granted a motion for summary judgment in favor of the individual defendant Board members holding that they "are protected by the doctrine of qualified immunity [and therefore] all claims against them for damages must be dismissed." Further, the district court granted a motion for summary judgment as to

two former Board members because they could not provide any of the equitable relief sought.

The case was tried on July 20, 1983, upon a record consisting entirely of stipulated facts, depositions, answers to interrogatories and documentary evidence. On December 8, 1983, the district court issued a thorough opinion granting judgment for the defendants in all respects. *McCreary v. Stone*, 575 F. Supp. 1112 (S.D.N.Y. 1983). This appeal followed.

DISCUSSION

Before framing and discussing the precise issue before this court, it is helpful to discuss briefly several findings and conclusions that the district court made, all of which are uncontested by the parties. First, the district court found that Boniface Circle is a traditional public forum. *McCreary*, 575 F. Supp. at 1123. It reached this conclusion because:

> 1) the Village has never shown an inclination to legally establish or even describe Boniface Circle as anything other than a park of the kind that is traditionally dedicated to First Amendment activities, and 2) the Village's pattern of granting and denying access to Boniface Circle belies the conclusion that it is either a limited public forum or no public forum at all.

Id. The finding that Boniface Circle is a traditional public forum is not clearly erroneous. As Judge Stewart properly noted, Boniface Circle was deeded to the Village in 1931 "for PARK PURPOSES ONLY," and the public since that time has used the park on numerous occasions for a variety of purposes. *Id.* at 1123-24. *See also United States v. Grace*, 103 S. Ct. 1702, 1706-07 (1983)(Parks "are considered, without more, to be 'public forums'.")(citations omitted); *Perry Education Association v. Perry Local Educators' Association*, 103 S. Ct. 948, 954-55 (1983); *Hague v. CIO*, 307 U.S. 496, 515 (1939)(Parks "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.").

After thus characterizing Boniface Circle, the district court proceeded to determine whether the denials of access to Boniface Circle to the Citizens' Group or the Creche Committee were content-based or were based on a content-neutral restriction. *See Perry*, 103 S. Ct. at 955 (state may enforce exclusion in a public forum that is content-neutral, that is narrowly tailored to serve a significant governmental interest, and that leaves open ample alternative channels of communication; state may enforce content-based exclusion in a public forum only if it shows that the exclusion is necessary to serve a compelling state interest and is narrowly drawn to achieve that end); *see also Widmar*, 454 U.S. at 270. The district court determined that the denials herein were content-based. *McCreary*, 575 F. Supp. at 1125. This determination is supported by the record. As Judge Stewart wrote, "The record makes clear that the historical concern, and by 1981 the reason for denying access, derived from a feeling that because the symbol was religious it should not be on *any* public land." *Id.* (emphasis in original). The district court also correctly noted, "The second reason for finding that the denial was content-based is that all other applicants who, like plaintiffs, applied only for access to Boniface Circle were referred to other Village-owned property when their applications to Boniface Circle were denied." *Id.* Finally, we agree with the district court's findings that a symbol for first amendment purposes may be a form of speech, *id.* at 1122 n.5 (noting that the Village conceded this point).

The principal issue before us on appeal is whether the Village's content-based denials of the applications to display a creche for a period of approximately two weeks during the Christmas holiday season at Boniface Circle, a traditional public forum, were necessary in order to serve the compelling state interest of avoiding contravention of the establishment clause of the first amendment. The district court, concluding that the denials were proper, *McCreary*, 575 F. Supp. at 1133, reached its conclusion by partially distinguishing this case from *Widmar v. Vincent*, 454 U.S. 263 (1981). Of importance, however, is that the district court at that time did not have the

benefit of *Lynch v. Donnelly*, 104 S. Ct. 1355 (1984), a creche decision with major impact on this litigation. We disagree with the district court's analysis of *Widmar* in light of *Lynch*; therefore, we reverse and remand.

The first amendment to the United States Constitution states in pertinent part that "Congress shall make no law respecting an establishment of religion . . . or abridging the freedom of speech . . . ." The first amendment, of course, is applicable to the states. *Everson v. Board of Education*, 330 U.S. 1, 8 (1947); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). The Supreme Court recently has written that the establishment-clause language in the first amendment "is not a precise, detailed provision in a legal code capable of ready application," and that "[t]he purpose of the Establishment Clause 'was to state an objective, not to write a statute.' " *Lynch*, 104 S. Ct. at 1361-62 (quoting in part *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970)). Over the years, establishment-clause cases have presented "especially difficult questions of interpretation and application," *Mueller v. Allen*, 103 S. Ct. 3062, 3065 (1983). In this case, we are faced with the additional difficulty of reconciling establishment-clause issues with free-speech issues; however, the recent Supreme Court precedents of *Widmar* and *Lynch* help us to "perceive the lines of demarcation," *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971), in these important areas of constitutional law.

In *Widmar*, eleven students of the University of Missouri at Kansas City brought suit to challenge a University regulation that prohibited their religious group from meeting in University facilities as other student organizations did. 454 U.S. at 265-66. The Supreme Court, Justice Powell writing, announced that "[t]he Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place." *Id.* at 267-68. Noting that religious worship and discussion "are forms of speech and association protected by the First Amendment," *id.* at 269, the Court stated that "[i]n order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the

University . . . must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Id.* at 269-70.

The University in *Widmar* contended that its regulation was necessary to serve the compelling interest of maintaining separation of church and state as required by the establishment clause. *Id.* at 270. The Court agreed that such an interest "may be characterized as compelling," *id.* at 271, but that an equal-access policy would not contravene the establishment clause. *Id.* Referring to the guidance of the three-pronged test established in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), the Court noted "that an open-forum policy, including nondiscrimination against religious speech, would have a secular purpose and would avoid entanglement with religion." *Widmar*, 454 U.S. at 271-72 (footnotes omitted). Moreover, the Court concluded that the primary effect of the public forum would not be the advancement of religion. *Id.* at 273. As to the latter conclusion, the Court explained that incidental benefits do not violate the prohibition against primary advancement of religion, *id.*; that "an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices," *id.* at 274; and that the forum in dispute was available to benefit "a broad class of nonreligious as well as religious" groups, *id.* Finally, the Court held that the University's interest was not "sufficiently 'compelling' to justify content-based discrimination against [the student group's] religious speech," but that "this case in no way undermines the capacity of the University to establish reasonable time, place, and manner regulations." *Id.* at 276 (footnote omitted).

Less than three years after *Widmar*, the Supreme Court decided *Lynch*. In *Lynch*, the City of Pawtucket, Rhode Island, erected a Christmas display as part of its observance of the Christmas holiday season. The display included figures traditionally associated with the holiday such as a Christmas tree, a Santa Claus house and a virtually life-sized creche. 104 S. Ct. at 1358. The City not only erected and later dismantled the creche, it owned the creche—having originally purchased it—and, in addition, incurred nominal expenses in displaying it

each year. *Id.* Several Pawtucket residents and others brought an action challenging the City's inclusion of the creche in the Christmas display. Beginning with the acknowledgement that total separation of church and state in the absolute sense is not possible, *id.* at 1358-59, and that the Constitution affirmatively mandates accommodation of all religions, *id.* at 1359, the Court focused on the creche "in the context of the Christmas season." *Id.* at 1362. Chief Justice Burger wrote:

> The District Court plainly erred by focusing almost exclusively on the creche. When viewed in the proper context of the Christmas Holiday season, it is apparent that, on this record, there is insufficient evidence to establish that the inclusion of the creche is a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message.

Id. at 1362-63. Additionally, the Court noted that the inclusion of the creche did not give aid to religion that was any greater than the benefits and endorsements approved in other Supreme Court establishment-clause cases. *Id.* at 1364. It stated:

> We can assume, *arguendo*, that the display advances religion in a sense; but our precedents plainly contemplate that on occasion some advancement of religion will result from governmental action. The Court has made it abundantly clear, however, that "not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon [religion] is, for that reason alone, constitutionally invalid."

Id. (quoting in part *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 771 (1973)). Moreover, the Court rejected arguments that the City's display of the creche involved forbidden entanglement by the state with the church, *Lynch*, 104 S. Ct. at 1364, and also decided that an inquiry into potential political divisiveness was not necessary because the dispute did not involve direct subsidies to church-sponsored schools, colleges, or other religious institutions. *Id.* at 1364-65. Finally, the Court held that "notwithstanding the religious significance of the creche," the City did not violate the establishment clause. *Id.* at 1366.

In light of the Supreme Court's dispositions of *Widmar* and *Lynch*, we turn now to the instant dispute. Initially, the Creche Committee raises an issue concerning the proper mode of analysis. It argues that the *Lemon* three-pronged analysis should not be used for guidance by this court. We disagree. The *Lemon* test asks whether governmental conduct in an establishment-clause case has a secular purpose, whether the principal or primary effect of that conduct advances or inhibits religion and whether the conduct will foster an excessive governmental entanglement with religion. *Lemon*, 403 U.S. at 612-13. It is settled that if one prong of the test is breached, the challenged governmental conduct will violate the establishment clause. *See, e.g., Stone v. Graham*, 449 U.S. 39, 40-41 (1980)(per curiam). The *Lemon* test generally has guided courts in the establishment-clause area, *Mueller*, 103 S. Ct. 3066, although the Supreme Court has warned that in this area it will not be bound by a single test. *Lynch*, 104 S. Ct. at 1362; *see, e.g., Marsh v. Chambers*, 103 S. Ct. 3330 (1983); *Larson v. Valente*, 456 U.S. 228 (1982). We believe that the district court proceeded correctly by applying the *Lemon* test and we will also use it for guidance. We note that the Supreme Court used the test for guidance in *Lynch*, 104 S. Ct. at 1362, and in *Widmar*, 454 U.S. at 271, and that our court previously has used the test for guidance. *See Brandon v. Board of Education*, 635 F.2d 971, 978 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981).

The first prong of the *Lemon* test asks whether the government's conduct in allowing the display of a creche has a secular purpose. Judge Stewart determined that allowing a creche would not violate the establishment clause for want of a secular purpose. *McCreary*, 575 F. Supp. at 1128. We agree. *Widmar* teaches that pursuing an open-forum policy that allows equal access for religious as well as nonreligious speech is an acceptable secular purpose. *Widmar*, 454 U.S. at 271. As the district judge noted, *Widmar* is controlling on this prong; therefore, we agree with his resolution.

The excessive-entanglement prong of the *Lemon* test asks whether the government's conduct in allowing the display of a

creche will foster excessive governmental entanglement with religion. "Entanglement is a question of kind and degree." *Lynch*, 104 S. Ct. at 1364. The district judge herein determined that *Widmar*'s admonition, that *enforcing* an exclusion would involve some entanglement, was appropriate because the Village then would have to determine which symbols presented to it are principally religious. *McCreary*, 575 F. Supp. at 1128. Further, the district judge determined that the potential-political-divisiveness part of the excessive-entanglement prong was insufficient to constitute an establishment-clause violation. *Id.* at 1129. We agree with these observations. First, merely allowing access to display a creche would not foster excessive administrative entanglement. In reality, when evaluating an application for display of a creche, the Village will have to do no more than when evaluating any other request for access to its public properties. Further, allowing access would not involve continuing state surveillance, which might be necessary if financial grants were involved, *Lemon*, 403 U.S. at 621, or which might be necessary to ensure compliance with rules excluding religious speech. *Widmar*, 454 U.S. at 272 n.11. Additionally, the Village's involvement here would be far less than the involvement of Pawtucket, the sponsor of the creche in *Lynch*. *See* 104 S. Ct. at 1358.

Lynch has resolved any doubt that may have existed about the district court's resolution of the potential-political-divisiveness contention that the Village continues to emphasize here on appeal. Following a footnoted reference in *Mueller*, 103 S. Ct. at 3071 n.11, *Lynch* specifically limited the potential-political-divisiveness part of the excessive-entanglement prong to cases involving direct subsidies to church-sponsored schools, colleges or other religious institutions. *Lynch*, 104 S. Ct. at 1364-65. Plainly, this is not such a case. Further, *Lynch* pointed out that potential political divisiveness may not be permitted to invalidate otherwise permissible conduct. *Id.* at 1364. Justice O'Connor, in her concurring opinion stated that "political divisiveness along religious lines should not be an independent text of constitutionality." *Id.* at 1367. Thus, even though it was without benefit of *Lynch*'s guidance in this area,

we believe that the district court reached the correct conclusion as to excessive entanglement, namely, that this prong of the *Lemon* test was not violated herein.

The primary-effect prong of the *Lemon* test is violated only if the governmental action has "the direct and immediate effect of advancing religion." *Nyquist*, 413 U.S. at 784 n.39. "Comparisons of the relative benefits to religion of different forms of governmental support are elusive and difficult to make." *Lynch*, 104 S. Ct. at 1363. However, governmental action that provides only indirect, remote or incidental benefits does not violate the establishment clause. *Nyquist*, 413 U.S. at 771. Not surprisingly, our prime area of disagreement with the district court relates to its analysis of this prong because it is with respect to this prong that *Lynch* has its major impact. The district court determined that *Widmar* did not control the primary-effect prong because *Widmar* involved speakers using public property. *McCreary*, 575 F. Supp. at 1129-30. According to the district court, the crucial inquiry in this case was whether "the manner chosen by the plaintiffs to convey their religious message sufficiently relies on the 'prestige, power and influence' of the Village to constitute an impermissible state advancement of religion." *McCreary*, 575 F. Supp. at 1130 (quoting *School District of Abington Township v. Schempp*, 374 U.S. 203, 307 (1963) (Goldberg, J., concurring)). Using this approach, the district court determined that allowing plaintiffs' creche to stand ten or so days at Boniface Circle would have the direct and immediate effect of advancing religion.

We disagree. In *Lynch*, the Court determined that the display of the creche did not advance religion in general or the Christian faith in particular any more than those benefits and endorsements found not violative of the establishment clause in other Supreme Court cases. 104 S. Ct. at 1363-64. *See Marsh v. Chambers*, 103 S. Ct. 3330 (1983) (chaplain opening state legislative sessions paid with public funds); *Roemer v. Board of Public Works*, 426 U.S. 736 (1976) (plurality opinion) (aid to private institutions of higher learning); *Tilton v. Richardson*, 403 U.S. 672 (1971) (construction grants); *Board*

of Education v. Allen, 392 U.S. 236 (1968) (free textbooks); *Zorach v. Clauson*, 343 U.S. 306 (1952) (program allowing release of students during school hours for religious instruction); *Everson v. Board of Education*, 330 U.S. 1 (1947) (school transportation). The Supreme Court in *Lynch* acknowledged that the display of the creche would advance religion "in a sense," 104 S. Ct. at 1364, but determined that the effect was indirect, remote or incidental. *Id.* As we noted earlier, the city involved in *Lynch* purchased, erected, displayed, sponsored and owned the creche therein. If the *Lynch* creche was not construed as a primary advancement of religion, *a fortiori*, the Village's neutral accommodation herein to permit the display of a creche in a traditional public forum at virtually no expense to it cannot be viewed as a violation of the primary-effect prong of the *Lemon* test and, therefore, violative of the establishment clause. As the Court noted in *Widmar*, religious benefits derived from the use of an open-access forum are incidental, 454 U.S. at 274, and the availability of benefits to a broad spectrum of groups is an important index of secular effect. *Id.*; *Mueller*, 103 S. Ct. at 3068. Here, there is no doubt that Boniface Circle is *available* to a broad range of Scarsdale's nonreligious and religious organizations, groups and persons. The district court stated that it did not believe that a broad class of nonreligious and religious symbols will abound in Scarsdale's parks. *McCreary*, 575 F. Supp. at 1132. However, this belief does not lessen the opportunities for free-speech usage of Scarsdale's public forums, including Boniface Circle. Further, we reject as sheer conjecture any implication that the Village will be overrun with applications for use of the limited space in its public forums. As we will discuss later, the Village has the freedom to enact reasonable, content-neutral time, place and manner regulations regarding the use of its public forums.

The district court also attached emphasis to how the creche would *appear* when placed on Village property. *McCreary*, 575 F. Supp. at 1131-33. In *Lynch*, the majority rejected an argument based on appearance advanced by the dissent. 104 S. Ct. at 1364. As previously stated, the *Lynch* Court indicated

that any perception that Pawtucket had aligned itself with the Christian faith by including the creche in its display was not a primary advancement of religion because the benefits conferred in such a situation are indirect, remote or incidental. *Id.* Moreover, *Widmar* stated that "an open forum . . . does not confer any imprimatur of State approval on religious sects or practices." 454 U.S. at 274. Under these principles, the Village's actions in permitting access to Boniface Circle for display of a creche—the same actions that would be necessary in permitting access for any display—do "not lead it into such an intimate relationship with religious authority that it appears . . . to be sponsoring . . . that authority." *Roemer*, 426 U.S. at 747-48 (footnote omitted). Additionally, we note that the appearance aspect in this case exists to a much lesser degree than the appearance aspect discussed by the Court in *Lynch*, 104 S. Ct. at 1364 ("display of the creche is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself").

Finally, the district court also concluded that the appearance of Village support was a problem because "the community viewing the creche includes children who cannot be counted on to 'appreciate that the [Village's] policy is one of neutrality toward religion.' " *McCreary*, 575 F. Supp. at 1132 (quoting *Widmar*, 454 U.S. at 274 n.14). We reject this basis for the district court's holding. This contention causes us to hesitate; however, assuming there is a reason for articulating principles vis-a-vis children separate from those that we have stated above in relation to primary advancement of religion, the record herein contains "little direct testimony," *McCreary*, 575 F. Supp. at 1128 n.16, on which to base such a distinction. We note that the Village did not even introduce the kind of evidence that other courts have considered regarding such a theory. *See, e.g., Country Hills Christian Church v. Unified School District No. 512*, 560 F. Supp. 1207, 1216 (D. Kan. 1983) (no studies done regarding theories on children; therefore, psychologist's testimony considered speculative); *Citizens Concerned for Separation of Church and State v. City and*

County of Denver, 526 F. Supp. 1310, 1314-15 (D. Colo. 1981) (district court considered evidence presented on the effect of a nativity-scene display on children inconclusive; evidence consisted of expert psychological testimony and a study performed on children).

Another appearance aspect of this case concerns the disclaimer sign placed beside the Committee's creche from 1976 through 1980 as a condition for authorization to display the creche at Boniface Circle. The sign measured 10 3/4 inches by 14 1/2 inches, contained letters 1/2 inch high, was unlit and read: "This creche has been erected and maintained solely by the Scarsdale Creche Committee, a private organization." *McCreary*, 575 F. Supp. at 1118. The district court was of the view that disclaimer-sign details were "minutiae" and, based on its "land as the message bearer" theory, hypothesized that primary-advancement-of-religion problems would not be cured because "it is doubtful that a sign saying that a symbol has been 'erected and maintained' by a private group will entirely eliminate the appearance of state support when public land is still the one visible thing to which the speech may be attributed." *Id.* at 1132-33. Our view differs. First, *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam), cited by the district court, is inapposite. In *Stone*, the Court determined that the government did not have a secular purpose for the display of the Ten Commandments in a public school. *Id.* at 41. Here the Village has a secular purpose and public schools are not involved. However, we think there is some basis for the district court's concern that while a creche on public land would be visible, the subject sign would not. Therefore, we do not believe that the disclaimer sign should be rejected entirely as a device to further ensure that the creche display will not be attributed to the Village. As the Citizens' Group points out, *Allen v. Morton*, 495 F.2d 65 (D.C. Cir. 1973) (per curiam), is instructive. In *Allen*, the court determined that a creche would not violate the establishment clause if acompanied by appropriate plaques indicating that the government did not sponsor the event involving the creche. *Id.* at 67. The court emphasized that the "plaques should be designed for maximum exposure

and readability." *Id.* at 90 (Leventhal, J., concurring). That court noted that the district court, if necessary, should enter an injunction requiring the posting of appropriate plaques. *Id.* In addition to *Allen*, the Supreme Court has made reference to disclaimer signs as a proper means of diminishing the likelihood of appearance of support. *See Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 87 (1980) (connection with message can be disavowed by "simply posting signs"); *see also Lynch*, 104 S. Ct. at 1376 (Brennan, J., dissenting). We believe that a proper disclaimer message—especially when coupled with the presence of the valid secular purpose, the lack of excessive entanglement, the Village's general grants of access to its public properties and the publicity the Village's official views have received in Scarsdale—will ensure that no reasonable person will draw an inference that the Village supports any church, faith or religion associated with the display of a creche during the Christmas season at Boniface circle. Therefore, on remand, we instruct the district court to conduct proceedings and to enter an order concerning the size, visibility and message of an appropriate disclaimer sign or signs. While we leave the details to the district court's discretion, we note that the sign heretofore displayed appears to us to be too small. As the district judge noted, "It appears that the sign was not readable by persons standing on the perimeter of the park or traveling past Boniface Circle in a car, although the creche could have been recognizable from such at either point." *McCreary*, 575 F. Supp. at 1118-19. We have no reason to think that this observation is clearly erroneous. Fed. R. Civ. P. 52(a).

The Village attempts to distinguish *Lynch* from the subject situation by referring to *Lynch*'s reference to the Pawtucket creche as presented in the context of "a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights [and] a large banner that reads 'SEASON'S GREETINGS'." 104 S. Ct. at 1358. We reject this distinction for two reasons. To begin with, assuming *arguendo* that the Village's interpretation is correct, the Christmas celebration in the

Village is not significantly different than the Christmas celebration described in *Lynch*. In Scarsdale, the Village is decorated with many traditional symbols of Christmas. Moreover, Boniface Circle has been the recent site of the Christmas Carol Sing and the site of numerous Christmas decorations. More importantly, the Village's reading of *Lynch* is erroneous as applied to this case. The Supreme Court did not decide the Pawtucket case based upon the physical context within which the display of the creche was situated; rather, the Court consistently referred to "the creche in the context of the Christmas season," *id.* at 1362, or the "Christmas Holiday season," *id.* After determining that the proper context for analysis was the Christmas season, the Court noted:

> To forbid the use of this one passive symbol—the creche—*at the very time people are taking note of the season* with Christmas hymns and carols in public schools and other public places, and while the Congress and Legislatures open sessions with prayers by paid chaplains would be a stilted over-reaction contrary to our history and to our holdings. If the presence of the creche in this display violates the Establishment Clause, a host of other forms of taking official note of Christmas, and of our religious heritage, are equally offensive to the Constitution.

Lynch, 104 S. Ct. at 1365 (emphasis added). Thus, the Village's display-context argument fails.

The Village also contends that *Lynch* is distinguishable from this case because the creche in *Lynch* was displayed on private land. We also reject this contention. We fail to find substantiality in this asserted private/public land distinction when comparing the creche in *Lynch* with either creche in this case. The Pawtucket creche had been displayed for forty or more years with active involvement by the government, including funding, albeit modest in amount, and sponsorship by the city. Here, the Village would merely accommodate a privately-owned creche in a public park that is a traditional public forum. Further, there is no proposed active involvement, sponsorship or financial support by the Village. The cases referred to by the

Village, and cited in Justice Brennan's dissent in *Lynch*, 104 S. Ct. at 1370 n.1, are not applicable to this case. *American Civil Liberties Union of Georgia v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir. 1983) (per curiam), involved a permanent religious display on public property. The display of the creche herein in the context of the Christmas season for approximately two weeks falls short of the permanency referred to in *Rabun*. *Id*. at 1101-02. Moreover, *Gilfillan v. City of Philadelphia*, 637 F.2d 924 (3d Cir. 1980), *cert. denied*, 451 U.S. 987 (1981), concerned a special platform constructed for the Pope to celebrate Mass and to deliver a message to the people of the City of Philadelphia, and involved a substantial financial commitment by the city of over $200,000. 637 F.2d at 927. In addition, the court there determined that the city's actions were undertaken with a religious purpose, *id*. at 930, that the religious effect of the city's actions was "plain and primary," *id*. at 931, and that the city had become entangled with religion when preparing the platform, *id*. at 932. None of these factors is present herein and thus *Gilfillan* is inapposite. Finally, *Fox v. City of Los Angeles*, 22 Cal.3d 792, 587 P.2d 663, 150 Cal. Rptr. 867 (1978) (in bank), is also not helpful to the Village's position. In *Fox*, the city illuminated on its city hall a huge cross to honor Christmas and Eastern Sundays (Latin and Eastern Orthodox). 587 P.2d at 663-64. There the city acted at its own initiative, *id*. at 671 (Bird, C.J., concurring), it placed the cross in position at public expense, *id*., and it identified itself with the Christian religion, *id*. at 670. Again, none of these factors is present herein.

We have noted that establishment-clause cases should be evaluated according to the particular facts before the court. *Brandon*, 635 F.2d at 973. Adhering to that instruction, we take care to emphasize the narrowness of our ruling and hold only that the Village would not contravene the establishment clause by allowing the display of a creche at Boniface Circle, a traditional public forum, for a period of approximately two weeks during the Christmas holiday season. We point out that the problem with the prohibition herein existed because it was

content-based. Our ruling does not affect the ability of the Village to establish reasonable time, place and manner restrictions regarding the use of its public properties, including Boniface Circle. *See Widmar*, 454 U.S. at 276 & 276 n.19. The crucial inquiry in this area is whether the "manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972). If the manner of expression is compatible, the state may impose "reasonable time, place, and manner regulations as long as the restrictions 'are content-neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels of communication'." *Grace*, 103 S. Ct. at 1707 (quoting *Perry*, 103 S. Ct. at 955).

CONCLUSION

For the foregoing reasons, we reverse the judgment of the district court. We remand for the entry of an injunction prohibiting the Village from relying on the establishment clause as a reason for prohibiting the erection of a creche at Boniface Circle, a traditional public forum, for a period of approximately two weeks during the Christmas holiday season; for action regarding a disclaimer sign or signs; and for other such action as is consistent with our determination herein.

Reversed and remanded.

Opinion of the District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

83 Civ. 987 (CES)

KATHLEEN S. MCCREARY, DAVID DRABKIN, ANN F. CAWLEY, ANGELINA J. MESSENGER, EDWARD R. NAPOLITANO, CHARLES E. BUTLER, JOHN D. HAWKINS, NANCY G. STEGAR, RICHARD CACCIATO, CAROL ANN PASCAL, MARY T. THOMPSON and GREGORY DESOUSA,

Plaintiffs,

—against—

JEAN STONE, ELISABETH M. BROWN, EDWARD FALKENBERG, BEATRICE K. UNDERWEISER, THE BOARD OF TRUSTEES OF THE VILLAGE OF SCARSDALE and THE VILLAGE OF SCARSDALE,

Defendants.

83 Civ. 3266 (CES)

THE SCARSDALE CRECHE COMMITTEE, PATRICIA CURRAN, CYNTHIA BARSUHN, GRACE FELLOWS, DORIS ADLER, MARY TULLY, JOAN MANN and MARIA PEDULLA,

Plaintiffs,

—against—

THE VILLAGE OF SCARSDALE and THE BOARD OF TRUSTEES OF THE VILLAGE OF SCARSDALE,

Defendants.

STEWART, *District Judge:*

In these cases we are asked to decide whether defendants, the Village of Scarsdale (the "Village"), its governing board of trustees (the "board of trustees" or the "trustees" or the "board") and, in 83 Civ. 987, two individual trustees,[1] acted within the bounds of the Constitution in denying access to a Village-owned park for the purpose of displaying a privately owned "creche" or nativity scene. There are two groups of plaintiffs (collectively they will be referred to as the "plaintiffs") in this consolidated action. The plaintiffs are known as the Scarsdale Creche Committee (the "Creche Committee") and the Citizens Group. Plaintiffs bring their claims pursuant to 28 U.S.C. § 2201 and 42 U.S.C. § 1983 asserting a denial of free speech and free exercise rights as guaranteed by the First and Fourteenth Amendments. The Creche Committee also alleges a denial of equal protection. Plaintiffs seek both a declaration that their rights have been denied and a permanent injunction against further denials. The case was tried on July 20, 1983 and the record consists exclusively of stipulations of fact, depositions, answers to interrogatories, and exhibits. The parties do not dispute the authenticity of any documents submitted as exhibits, and have agreed that the depositions and answers to interrogatories may be received in evidence as if given as testimony at trial. Jurisdiction is premised on 28 U.S.C. §§ 1331 and 1343(3). This opinion sets forth the court's findings of fact and conclusions of law.

I. BACKGROUND

The Village of Scarsdale is a municipal corporation located north of New York City in the County of Westchester. It has a population of about 17,000 people, Tooley dep. at 38, and its residents include persons of varying religious faiths.[2]

1 In a memorandum decision dated July 20, 1983, this court dismissed damage claims against the four individually named defendants, and insofar as they were no longer trustees, dismissed all equitable claims against defendants Stone and Brown.

2 Although the parties have not stipulated as to the religious composition of the Village, the record in varying places suggests that the community

In 1931 a small plot of land, which has come to be known as Boniface Circle, was deeded to the Village of Scarsdale. Boniface Circle is one of a number of parks in the Village. It has a dimension of 3,255 square feet, is bounded on all sides by roadways and is surrounded by both residential and commercial property, the latter including professional offices, a restaurant, and sporting goods, clothing (for men, women and children), grocery, and other stores. The park is oval in shape, largely grass-covered, and is considered to lie in the center of the retail business district of the Village.

Located in the park are a large evergreen tree, various hedges, two benches, two lamp posts, a walkway and a flagpole. Also located in the park is a war memorial to the veterans of World War II. The war memorial, built in 1949, consists of a stone wall on which plaques recalling the names of war dead are mounted. In front of the wall is a small terrace of flagstones and some steps leading up to the slightly higher ground level of the rest of the park. The entire memorial occupies about one-sixth of the park. Boniface Circle is visited year round by persons of "all stripes", *id.* at 84, for what appear to be varying reasons, among them as a way-through for pedestrians from one street in the business district to another. Parking meters surround about half of the park.

Over the years access to Boniface Circle for assembly or speech purposes has been somewhat limited. A detailed description of such uses is set out below in the portion of this opinion discussing Boniface Circle's status as a "public forum." Suffice it to say here that applications for its use for First Amendment purposes have historically been passed upon by the board of trustees, the Village's governing body, that there are no statutes or regulations setting forth guidelines upon which the board bases its decision to grant or deny access, and that there are no statutes or ordinances which otherwise set forth guidelines as to how and when Village property may be used for such purposes.

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of Scarsdale includes adherents of Christian, Jewish, and several "Eastern" religious faiths. The Village also has a Mormon Church and followers of the Bahai faith and several newer religions such as that of the Reverend Moon.

One of the primary uses to which Boniface Circle has been put is as a locus for Christmas celebration. Every year the Village has allowed the Chamber of Commerce to decorate the two lamp posts in the park and the lamp posts surrounding it with ornaments of various kinds. The Town Club, a private organization, has been granted access to Boniface Circle in 1959, 1962 through 1965, 1968 through 1971 and in 1982 to hold a Christmas Carol Sing. On other occassions the Town Club has met on other Village-owned property for caroling. In 1982 the Village itself installed Christmas ornaments on the large evergreen tree in Boniface Circle, and displayed them for two and one-half weeks. And, beginning in 1956 and continuing through December 1980, Boniface Circle has been the site of a privately owned creche, displayed for about two weeks each year.

From 1957 through 1980 the sponsor of the creche display has been the Creche Committee. The Creche Committee is a private unincorporated association of seven Protestant and Catholic churches. Five of the churches are located in the Village of Scarsdale and two are located outside the Village but have a "Scarsdale, N.Y." post office address. Each church is represented on the Committee by one person and each pays a small annual donation to defray the cost of maintaining and displaying the creche. Except for a period prior to 1977 when the Village paid for the electricity to light a small light bulb in the creche, the entire cost of displaying and maintaining the creche has been borne by the Creche Committee. Since 1977 the creche has been unlit altogether.

The creche which since 1957 the Creche Committee has displayed at Boniface Circle consists of a wooden frame, approximately six feet high at the tallest point, and dropping off on both sides to about three and a half feet. The frame is nine feet long, three feet deep, and is covered on the inside by an oil painting. Placed inside the frame are nine hand-carved wooden figures ranging in size from six and one-half inches to three and a half feet. The creche is intended to portray the birth of Jesus Christ.

In each year from 1957 through 1983 the Creche Committee has submitted a written application to the board seeking

permission to display the creche at Boniface Circle. In 1981 and 1982, for the first time, the trustees denied permission. In 1981 the Creche Committee accepted an offer to display the creche across the street from Boniface Circle on private property belonging to the Frog Prince Proper restaurant. In 1982, the Creche Committee elected not to display the creche at all when its application for Boniface Circle was denied. The board vote to deny permission to erect the creche was 4-3 in both 1981 and 1982. The 1983 application is still pending. Also pending is an application to display a creche by the Citizens Group, a private unincorporated association of persons not representing churches. The Citizens Group first applied to display their creche in December 1982[3] after the Creche Committee's request for that year was turned down. The Group reapplied in early 1983 to display their creche the following December with the apparent intention of bringing this suit if the application was not approved. The board of trustees has taken the position that it should not act on the pending applications for 1983 while this lawsuit is under submission.

In recent times the question of whether the board should permit the displaying of the creche at Boniface Circle has been hotly contested, but it has not always been so. The original application by the Creche Committee in 1957, which expressed a desire to display the creche in order to convey "the real significance of Christmas" (Stipulation of Fact, hereafter "Stip.", 8, Ex. 3), was unanimously approved by the board as were all subsequent applications through 1972. However, as early as 1960 events began to transpire which made what had been a routine approval by the board, not routine at all. In 1960 the American Jewish Congress, prompted by members of its Scarsdale chapter, wrote the board expressing concern over the placement of a "religious display on public property." The letter stated, "We, as members of the Jewish faith, find religious display natural and acceptable on Church property,

3 To be precise, the December 1982 application was made by a group of individuals, four of whom are now plaintiff members of the Citizens Group. It appears that this application was to display the same creche that the Citizens Group now seeks to display in accord with its 1983 application.

but are distressed by them [sic] when they appear in a public place which is shared by all residents of our community." The letter asked the board to "safeguard the neighborly feeling in our community by arriving at a decision which will strengthen the American principle of separation of Church and State." (Ex. 6).

The board, as it had in the past, unanimously approved the creche application for 1960, but the next year it appointed a "Special Committee" to study and report on the issue. In 1962 the Special Committe recommended after meeting with persons of differing views, including those with legal opinions, that there be "no change" in the board's policy of allowing the creche (Ex.8).

In January of 1963 the Scarsdale Chapter of the American Jewish Congress again appealed to the board to change its policy adding that "many members of the Jewish Community believed that their feelings . . . have been disregarded . . . [in] an area involving a great deal of emotion" (Ex.9). In response, the Special Committee arranged a meeting between those with divergent views on the creche and a professor at New York University in the field of Human Relations. No recommendation resulted and the board continued its unanimous approval of the creche over the next ten years.

In 1973 unanimity of board voting ended. For the first time one of the seven Village trustees abstained on the creche issue, and the following year the same trustee again abstained. In 1975 the trustee again abstained and on this occasion, for the first time, one trustee voted to deny the creche application. At least one negative vote was cast in every succeeding year thereafter through 1979. In 1980, three trustees voted no, and in 1981 and 1982 four trustees, constituting a majority, voted to deny permission for display of the creche. A review of the statements made by trustees abstaining or voting to deny the creche application, discussed in more detail below, indicates that these trustees were concerned with violating either the letter or spirit of the constitutional prescription that there be a separation of church and state.

The voting record of the trustees after 1972 reflected a growing division both on the board and also in the community

over the creche. In 1975 the board considered the letter of (apparently) a resident who opined that the creche's placement on public property was unconstitutional. The board directed its Village Attorney to look into the matter. In 1976 another Scarsdale resident advised the Village Attorney that if the Village Attorney concluded that the display was lawful, the resident would commence litigation. Shortly thereafter, a lawsuit was brought challenging the Board's annual approval of the creche application, but the suit was dismissed for procedural reasons. *See Rubin v. Village of Scarsdale*, 440 F. Supp. 607 (S.D.N.Y. 1976).

In response to the escalating division, a group of ten members of the clergy from five Scarsdale churches wrote to the board offering their respective church properties, on an annually rotating basis, for display of the creche. With their proposal the clergymen offered the following "statement":

> The symbols of religion say different things to different people. A Creche, for example, symbolically makes a particular religious statement which is not held by all.
>
> In keeping with our respect for one another's beliefs and in keeping with our government's position to protect religious freedom without promoting or restricting particular religious views, we believe that it is inappropriate to use public property to make a religious statement. The freedom here involved is the right of each individual within the community to be assured that no certain religious symbol is presumed to represent him on the property which belongs to him in common with the fellow members of his community.
>
> This is not to say that religious symbols should not be seen in a community. Homes, media announcements and places of worship can be used by those wishing to call attention to their beliefs. In this way, the religious pluralism and freedom which we enjoy in this country are best served.
>
> Our proposal, therefore, is not to remove the Creche from public view but rather to move the Creche to a location which is not public property. (Ex. 62, pp. 3-4).

In the same year, 1976, the clergy of yet another church wrote the Village Mayor to express opposition to moving the creche to church property. This letter expressed the view that an "overwhelming majority" of the church's "more than 1000" parishioners believed that the "tradition of eighteen years" of displaying the creche at Boniface Circle should not be changed. The letter suggested that "if the creche is excluded from town property quite logically the scheduled singing of Christmas carols . . . [and the displays of] Christmas trees and wreaths [should not] be permitted on public property." (Ex. 42).

The Village board responded to the growing controversy in 1976 by asking the board-appointed Human Relations Advisory Council ("Advisory Council") to make an appraisal of community attitudes regarding the creche. From 1976 to 1978 the Advisory Council recommended that "in the interests of community relations" permission to erect the creche be granted (Stip. 29(a)). The Advisory Council was of the view that the creche's presence at Boniface Circle was "accepted by a majority in the Scarsdale community" (Ex. 44). In 1980, "[d]ue to increased and diverse comments over the approval of the creche's placement in Boniface Circle during the 1979 Christmas season" the board again asked the Council to render a report on the issue (Ex. 46). On this occasion, the Advisory Council advised the board:

> All members of the Council feel that the Creche would be placed more appropriately on non-public property. All possible avenues have been explored. Church sites are not acceptable to the Creche Committee and suitable private property locations are not available. After consultation with the Village Attorney, the Council sees no legal problem as no public time or money is involved. The Council agrees unanimously that it is less devisive [sic] to good community relations to allow this long standing tradition to be maintained rather than to deny permission. (Ex. 46).

The Advisory Council made similar findings in 1981 and 1982, but in each year "it urged the Creche Committee to seek other sites." (Stip. 29(b)).

Apparently with the hope of quelling the dispute, the board began in 1976 requiring that the Creche Committee display a sign next to the creche indicating that the display was not sponsored by the Village. From 1976 through 1980 a small unlit sign was implanted next to the creche stating, "This creche has been erected and maintained solely by the Scarsdal[e] Creche Committee, a private organization." (Ex. 29). The dimensions of the sign are approximately 10 3/4 inches by 14 1/2 inches, its decal letters measures 1/2 inch high. It appears that the sign was not readable by persons standing on the perimeter of the park or traveling past Boniface Circle in a car, although the creche could have been recognizable from such at either point. On the other hand, one observing the creche head-on and from a few feet away, the vantage point from which its sponsors no doubt intended that it be viewed, would have been able to read the sign.

When the board of trustees voted to discontinue its long history of allowing the creche in 1981, a small uproar ensued which was refueled the following year when the board again voted to prohibit the creche. Former Mayor Jean Stone, who was identified in local newspapers as having cast the "deciding vote," received several box loads of mail on the subject, as did the board. In the Mayor's view many letters—at least 100—had an antisemitic tone. An unknown number of such letters, many unsigned, may have come from outside of Scarsdale, where news of the creche denial had spread. The Mayor testified that the letters she received often assumed incorrectly that she was Jewish because she voted against the creche (Stone dep. at 60-64).

Many dozens of the letters received by the board or the Mayor, or which were printed in the local press on this issue, have been made part of the record.[4] A significant number of those opposed to the board's decision denying the creche application (*see* Ex. 63) perceived the problem as one stemming from a difference between Christians and Jews, although only

4 A description of the mail and newspaper editorials which follows is intended to be illustrative and not exhaustive.

a handful were what could be called blatantly antisemitic. A few of the opposition letters expressly stated a view that the problem was not a Christian-Jewish one. Most of the opposition letters expressed "shock" or "disappointment" with the board's decision. Some argued that as long as access for the display of religious symbols was made equally available to other religious points of view, the creche should be displayed, and some were of the view that there was a constitutional right to have the creche displayed. Others, attempting to show the extreme consequences of the board's decision, argued that consistency would require the banning of caroling and wreaths from Boniface Circle, or even the sale of Christmas cards downtown. Some argued for a boycott of merchants in the downtown area, a plan which Mayor Stone believed was at least partly inspired by anti-Jewish sentiment. A few letters support the Mayor's conclusion. A number of opposition letters suggested that the board's decision constituted an attack on religion at a time when a national return to religion was needed. Many letters were in the form of petitions. One such letter/petition, subscribed to by about eighty or so signatories, stated, "Unless we are mistaken the United States is regarded by the world as a christian [sic] country, and the creche is simply a symbol of our christianity." Many letters deplored the ending of what they described as a "Village" or "Scarsdale Tradition." The letters at times refer to the creche as the "Scarsdale Creche."

A fewer number of letters, but still a great many, were received praising the board's decision (*see* Ex. 62). Quite a few called the decision "courageous," and most generally expressed "thanks." The commonly cited reason for supporting the board's decision was that it was improper to have religous symbols on public property, typically because the park belongs "to all the people in the Village." Some saw the display as primarily aimed at "teach[ing] the rest of us that Scarsdale is still a Christian community." Others thought is was wrong for the "government to facilitate wholly religous exhibits," and suggested that in the public mind "Boniface Circle in the center of the village, represents and is identified with Scarsdale and

the people of Scarsdale." One letter, published in a local newspaper, espoused the view that "the potent impact the message conveyed . . . [from] public premises upon which the religous symbol rests could not be purchased for money." A significant number of letters in support of the board's decision came from persons who identified themselves as Christians. One of these letters expressed the view, a view shared by the Mayor, that many non-Christians had over the years been reluctant to express their felt opposition to the creche. Another likened the request to have Boniface Circle bear a religious display to a request to have the "government . . . say [a person's] prayers for him," and a third saw the request as an "attempt to use [the] government to express [a] religious point of view."

Local newspapers (*see* Ex. 66) were generally supportive of the board's recent decisions, both pro and con, on the issue of whether to allow the creche. An editorial in early 1980 stated, "the questionability of the Village even seeming to be promoting religion is particularly great here where so much of the population does not belong to the religion which the display . . . can be considered to be promoting." Nevertheless, the paper supported the board's recent decision to allow the creche because "[a]fter more than 20 years, it would be clearly more offensive suddenly to bar it than to permit it again." When the board voted to deny the creche application in 1981, an editorial stated:

> The creche committee, had it heeded village appeals to find another location, could have averted this year's divisiveness. In the wake of the village's decision, the committee's current stance to keep the creche "boxed up" this year not only appears petulant, but it must cast doubt on the committee's true motives.
>
> Community good will would be better served if the creche committee would accept, with grace, the village board's decision and place the creche at an appropriate location. This could be the healing step to avert divisiveness in future years.

As the editorial suggests, the issues of whether 1) the Creche Committee or, for that matter the citizens Group, has available to it private property on which to place the creche, and 2) the creche proponents have actively sought to locate such property, have been issues of concern to the community and the board of trustees. Former Mayor Stone, for example, who in 1979 voted to allow the creche at Boniface Circle, took into consideration what she believed was the Creche Committee's unwillingness to seek out an alternative private site for the creche in later voting to deny access. When asked why the Creche Committee turned down the idea of rotating the creche among church properties, Patricia Curran, who is the chairperson of the Creche Committee, gave several reasons. The first was that "it would destroy the ecumenical aspect of the Creche Committee." The other reasons were that some of the properties were not centrally located, some had topographical problems, and some already had creches (Curran dep. at 55). Offers to make either the Scarsdale Congregational or the Cummunity Baptist Church a permanent home for the creche display, extended after the board denied access to Boniface Circle, were rejected for "topographical" and "landscaping" reasons. *Id.* at 17-18. While the other stated reasons may contain some merit, the first reason, a desire that the creche speak an "ecumenical" message, and the perception that this goal would best be achieved if the creche spoke from public land, appears to have been preeminent. The record indicates that the Creche Committee did not initiate, and in some instances did not even follow up leads which could have produced a suitable private site. Further, the Congregational and Baptist Churches appear to be accessible and central to residents, and the topographical problem of the former church, sloping grounds, seems surmountable. Lastly, the Creche Committee declined to display the creche at the Fr[illegible] Prince Proper Restaurant in 1982, located across the street from Boniface Circle, and accepted an offer to do so in 1981 only reluctantly. *See Id.* at 12-15. We note, in contrast, that the Creche Committee seems to have been fully willing to displaying the creche from two other public sites which were discussed. *See Id.* at 8-10. In short, it

appears that a dominant reason why the Creche Committee has wanted the creche at Boniface Circle is because Boniface Circle is *public* land. The position of the Citizens Group on this issue is simply that it has the right to place its creche on public property and therefore is not willing, pending the outcome of this lawsuit, to settle for a private site. *See* Butler dep. at 48; McCreary dep. at 84-85.

The applications by the Creche Committee and the Citizens Group which have been denied or are pending vary in terms of the time period sought to display the creche. Prior to 1980 applications by the Creche Committee requested only that the display be permitted during "the Christmas season." As noted, it appears that displays were permitted for about two weeks. In 1980 and 1981 the Creche Committee requested that the creche be allowed from December 17 to be removed "as soon as possible after the New Year." (Stip. 9(b)). The request in 1982 by the Creche Committee was the same except that the requested beginning date was December 16. The pending application by the Creche Committee for 1983 is "for the 1983 Christmas Season." Put into historical context, we construe this request to be for a period of about two weeks.

The Citizens Group application for 1982, which was denied, sought to display the creche from December 18 to December 26, or about nine days. The Citizens Group's pending request for 1983 is exactly the same except that the proposed starting date is December 17, and so is for about ten days. Although it appears that such details were never communicated to the board, the Citizens Group's heretofore never displayed creche is significantly smaller than the Creche Committee's (the figures in the nativity scene are only twelve inches high, although there are more of them, and the total area of the scene occupies only three feet across), and the Citizens Group would propose to display a larger sign indicating the Village's lack of endorsement of the creche than has the Creche Committee. McCreary dep. at 28-81, 40-41.

As a final matter, we note that creches are currently displayed during the Christmas season outside of homes and churches in Scarsdale, and that there is no indication that

either members of the community or the Village have ever expressed opposition to such displays.

II DISCUSSION

At the outset we address plaintiffs' free exercise claims. Only the Citizens Group has pressed these claims, and we find that they both do not describe the crux of the alleged wrong and otherwise are without merit. "To demonstrate an infringement of . . . free exercise rights, an individual must show 'the coercive effect of the [state] enactment as it operates against him in the *practice* of his religion.' " *Brandon v. Board of Education*, 635 F.2d 971, 976 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981) (quoting *Abington School District v. Schempp*, 374 U.S. 203, 223 (1963)) (emphasis added). To evaluate the coercive effect on the practice of religion, the court should "inquire into the relative importance of a particular religious ritual and the degree to which exercise of that practice is infringed by government action." *Id.* Governmental acts or policies forcing individuals "to choose [for example] between neglecting their religious obligations and rendering themselves liable for criminal sanctions or ineligible for state benefits" are particularly deplored. *Id.* at 977. In finding that plaintiffs' free exercise claims are insubstantial, we are persuaded by the following. First, plaintiffs have admitted that displaying a creche is not mandated by their religious beliefs. Butler dep. at 62; Curran dep. at 41. Second, plaintiffs have not on this record shown that displaying a creche on *public* property has *any* significance to their following the dictates of their religion. Third, the record is clear that plaintiffs may display creches on private property in Scarsdale. Fourth, and in sum, there is no evidence in this case that plaintiffs are being penalized for acting in accordance with their religious beliefs, thus forcing them to choose between so acting, and incurring the penalty, or not acting and avoiding it. *See generally Brandon v. Board of Education*, *supra*, at 977-78.

What we do find solidly implicated in this case is the question of whether plaintiffs have been impermissibly denied

access to Boniface Circle in order to exercise their right, guaranteed by the Free Speech Clause of the First Amendment, to *express* their religious views.

In assessing whether a free speech right of access to public property has been impermissibly denied,[5] the court must make an initial determination as to the nature of the property involved. This is because, as the Supreme Court recently explained, "The existence of a right of access to public property [to engage in speech] and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue." *Perry Education Association v. Perry Local Educators' Association*, 103 S. Ct. 948, 954 (1983). In *Perry* the Court identified three "categories" of public property relevant to the inquiry of whether a denial of access is valid, and also articulated the corresponding standards for evaluating such denials. The first category of public property consists of "places which by long tradition or by government fiat have been devoted to assembly and debate." *Id.*

> At one end of the spectrum are streets and parks which 'have immemorially been held in trust for use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'

Id. at 954-55 (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939). With regard to these "quintessential public forums . . . the state [may] enforce a content-based exclusion [only if] it . . . show[s] that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Id.* at 955. "The state may also enforce regulations of the

5 The First Amendment, applicable to the states through the Fourteenth, provides "Congress shall make no law . . . abridging the freedom of speech." Defendants have conceded "that a symbol for First Amendment purposes is a form of 'speech' " tr. at 49, and in fact they stress that a symbol is a "shortcut from mind to mind." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 632 (1943). Thus, there is no dispute here that an application to "speak" from public property was denied.

time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communications." *Id.*

The second category of property relevant to assessing denials of access for speech purposes comprehends those places "which the state has opened for use by the public as a place for expressive activity." *Id.* "Although a state is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum." *Id.* This type of public forum "may be created for a limited purpose such as use by certain groups, *e.g., Widmar v. Vincent*, 454 U.S. 263 (1981) (student groups), or for the discussion of certain subjects, *e.g., City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n*, 429 U.S. 167 (1976)(school board business)." *Id.* at 955 n.7.

The final type of public property relevant to free speech access analysis consists of "property which is not by tradition or designation a forum for public communication." *Id.* at 955. Such property might include the land on which a jail sits, *Adderley v. Florida*, 385 U.S. 39 (1966), a military base, *Greer v. Spock*, 424 U.S. 828 (1976), or, as in the *Perry* case itself, internal school mailboxes. With respect to this category of property "the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry, supra*, at 955.

Apparently with this analytical framework in mind, defendants raise by way of their first proposed defense what we consider to be the threshold issues in this case. Defendants take the position that their denial of plaintiffs' applications to display a creche did not violate plaintiffs' free speech rights because "Boniface Circle is not a public forum; it is a small piece of land reserved by the Village for solemn commemorative occasions connected with the war memorial. The creche display, moreover, is inconsistent with the dedicated purpose of

Boniface Circle." Def. Pre-trial Mem. at 25. The defendants elsewhere characterize Boniface Circle as a place exclusively for "patriotic reflection." *Id.* at 39.

Turning to the facts before us, we are unable to agree with defendants' characterizations of the property in issue and instead conclude that, like most "parks."[6] Boniface Circle is a traditional public forum falling into the first category of public property identified in *Perry.* We reach this conclusion principally because 1) the Village has never shown an inclination to legally establish or even describe Boniface Circle as anything other than a park of the kind that is traditionally dedicated to First Amendment activities, and 2) the Village's pattern of granting and denying access to Boniface Circle belies the conclusion that it is either a limited public forum or no public forum at all. With regard to the first point, Boniface Circle was deeded to the Village in 1931 "for PARK PURPOSES ONLY." (Ex. 1) (uppercase in original). No qualifications as to the type of park Boniface Circle was to be were set forth in the granting instrument and, indeed, the instrument provided that the land was to revert should it ever cease to be used "as a park or open space." *Id.* When the Village determined to create the war memorial in 1947, there was no expressed intention to transform *Boniface Circle* into a war memorial. Rather, the war memorial was to be "located *in the park* at Boniface Circle." (Ex. 70) (Emphasis added). The trustees' resolution establishing the memorial instructed that it was only to occupy "such part of the public land in Boniface Circle as is necessary for the accommodation . . . of a monument" (Ex. 73), and it is admitted that the memorial which was approved occupies only one-sixth of the public land. The Village has not subsequently attempted by way of some official act or proclamation to transform the nonoccupied part of Boniface Circle into a war memorial, and "[t]raditional public forum property will not lose its historically recognized character for the reason that it abuts government property that has been dedicated to a use

6 Parks are generally "considered, without more, to be 'public forums.' " *United States v. Grace*, 103 S. Ct. 1702, 1706-07 (1983).

other than as a forum for public expression." *United States v. Grace*, 103 S. Ct. 1702, 1709 (1983).

With regard to the second point, we note the following. First, while it is true that over the years most applications for access to Boniface Circle have been denied[7] and applicants have been referred to other public parks, it appears that only once in the span of decades since the memorial was built was the stated reason that Boniface Circle was dedicated to war memorialization. On that occasion the Village Manager stated that "Boniface Circle is a War Memorial and is *mainly* used for memorial occasions and services" (denial of access for high school literary magazine fundraiser) (Stip. 92, Ex. 100) (emphasis added). On the other occasions when access was denied, the stated reasons were "because of shopping, parking, traffic, etc." (denial of access for American Field Service carnival) (Stip. 79, Ex. 86), and because an alternative site "might be a safer place" for the proposed activity (alternative site approved for Girl Scout baked goods sale) (Stip. 81, Ex. 89). On all other occasions when access was denied, no reason for the denial was given.[8] Thus, while it does appear that the Village has been reluctant to allow speech and assembly on Boniface Circle, the denials of access just as easily support the conclu-

7 It is also true that there have been few applications for First Amendment access to Boniface Circle, probably because the park is\small and would not easily accommodate uses to which other Scarsdale parks have been put.

8 Defendants point out that one applicant, the American Red Cross, sought permission to erect a four foot by four foot red wooden cross at Boniface Circle and was turned down because "it would set a precedent and requests from similar organizations could not reasonably be denied" (Stip. 73, Ex. 84). This does not, of course, tell us *why* the Village was reluctant to set a precedent and since the Red Cross denial came at a time (1958) when display of the creche was already being permitted, it is not obvious that the Village's concern was to reserve Boniface Circle for patriotic activities. Indeed, an argument can be made that a Red Cross symbol, unlike a creche, is consistent with the theme of patriotism. In any event, it seems just as likely that the Village had for example, an aesthetic concen in mind and was improperly hoping to avoid the problem of having to develop valid time, place or manner restrictions to regulate future uses.

sion that the reason for this reluctance was unrelated to the war memorial as they do that it was related. *See also* Tooley dep. at 186 (lending support to this conclusion).

The approvals of access demonstrate that Boniface Circle's status as a forum only for patriotic or solemn commemorative occasions was at best a sometimes thing. In addition to the Fourth of July and Memorial Day celebrations,[9] the Village has permitted access to Boniface Circle "for a carnival in connection with the American Field Service Work Day" (Stip. 78, Ex. 87), and as the site for launching the "Community Fund Drive" (Stip. 87, Ex. 95). On the latter occasion, the Community Fund was permitted "to station a facsimile of a rocketship in the vicinity of the flag pole on Boniface Circle and to release a helium filled balloon from the nose of said rocketship." *Id.* Boniface Circle has also for many years been the site of Christmas celebrations. The Town Club has been allowed to sponsor its Christmas Carol Sing at Boniface Circle on numerous occasions with an official of the Village welcoming the carolers in his or her official capacity (Stip. 58, 60). On a number of occasions the Village provided an amplification system or platforms for the carolers' use (Stip. 58), and the 1982 Christmas observances like some earlier years featured the arrival of Santa Claus on a Village-owned fire truck (Stip. 60). Every year, apparently going a long way back, the Chamber of Commerce has been "permitted access to and use of Boniface Circle for the purpose of installing and displaying Christmas ornaments" (Stip. 57). And, of course, for twenty-four years, the Village authorized the placement of a creche at Boniface Circle. While defendants argue that the creche "is inconsistent with the dedicated purpose of Boniface Circle," they make no attempt to explain why the other authorized uses are consistent. In any case, we see no reason to conclude that the singing of "Frosty the Snowman," "O Little Town of Bethlehem," or "Hanukah" (Stip. 60, Ex. 80), the erection of

9 The record discloses that, with the exception of 1961, Fourth of July celebrations in the Village have occurred outside of Boniface Circle (Stip. 65, 70). Memorial Day celebrations have typically begun at Boniface Circle, where a wreath has been placed at the war memorial and a prayer said by a member of the clergy, who varies from year to year. A parade outside of Boniface Circle then has followed (Stip. 64).

platforms and an amplification system, or several of the other permitted uses of Boniface Circle are any more consistent with solemn, patriotic reflection or war memorialization than is a mute, barely illuminated nativity scene. Most importantly, over the twenty-six years that the propriety of placing a creche at Boniface Circle was discussed, or on any of the occasions when other uses of Boniface Circle were allowed, there is no evidence that the Village Board of Trustees ever considered whether the proposed use would be inconsistent with what defendants assert is the "dedicated purpose of Boniface Circle."[10] In sum, on the record before us, we are unable to conclude that the Village of Scarsdale "consciously has limited access," *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974), in a way which would warrant a finding that Boniface Circle is either a limited public forum or not a public forum at all. To the extent that it has allowed at least some access to what is by all description and appearance the kind of public property traditionally viewed as being "immemorially . . . held . . . for purposes of assembly" and speech, *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939), we find that Boniface Circle is a public forum. To the extent that the Village has *expressed* little concern for protecting Boniface Circle's alleged purpose, and otherwise has *acted* inconsistently toward it, *c.f. Niemotko v. Maryland*, 340 U.S. 268, 273 (1951) (manner restriction should not be credited as legitimate where officials act inconsistently toward it), we conclude that the forum is not "limited" within the meaning of *Perry* and the cases it cites. It may well be that a village can dedicate property solely for the pronouncement of patriotic views. *See.* L. Tribe, *American Constitutional Law* § 12-4 at 590. We hold only that this village has failed to do so in any legally cognizable way.[11]

10 In twenty-five years of board discussions, the only reference we have found which seems to take note of the war memorial while offering an opinon on the propriety of allowing the creche is a one sentence, apparently spontaneous remark by Trustee Gordon in 1976. The trustee stated in support of allowing the creche that he did not think Boniface Circle with its war memorial was an "entirely improper" location (Ex. 22).

11 An argument that Boniface Circle was closed as a public forum, or became a limited public forum, simultaneous to the board's decision to bar

Since plaintiffs were denied access to a traditional public forum, we must now evaluate the denial to determine whether it stemmed from a content-neutral time, place or manner restriction, or was content-based. We conclude the denial was content-based for two reasons. First, and most important, debate by Village trustees and other officials as to whether a creche should be allowed at Boniface Circle has historically always focused on the religious message the creche was thought to express. Thus, the perennial concern expressed was always that a *religous* symbol would be placed on "pubiic" or "village" property. Whether the juxtaposition of religious symbolism and public land was thought to violate the Establishment Clause or was merely thought to generate discord in the community, the concern was always the religiosity of the symbol and not, for example, whether the creche, as a three dimensional structure, would disrupt pedestrian traffic, or, as defendants imply, would detract from the "calm, tranquility, and . . . reverence," *Washington Free Community, Inc. v. Wilson*, 334 F. Supp. 77, 82 (D.D.C. 1971), *aff'd*, 484 F.2d 1078 (D.C. Cir. 1973), the Village purportedly seeks to maintain at Boniface Circle. (*See* Ex. 8, 9, 19-28). For this reason we think the fact that plaintiffs' applied for access only to Boniface Circle and not to some other park defendants suggest might have been more appropriate, is of no significance. The record makes clear that the historical concern, and by 1981 the reason for denying access, derived from a feeling that because the symbol was religious it should not be on *any* public land.

The second reason for finding that the denial was content-based is that all other applicants who, like plaintiffs, applied only for access to Boniface Circle were referred to other Village-owned property when their applications to Boniface Circle were denied *(see* Stip. 81, 87, 92 and Ex. 89, 95, 100). Relatedly, the Village has freely granted access to other parks for the erection of symbols and other three dimensional objects

the creche in 1981 would not be credible for two reasons. First, the Village continued to permit caroling and other Christmas activities in Boniface Circle in 1981 and 1982. Second, there is no evidence in the record that the Village board intended to do this.

(*see, e.g.*, Stip. 73, 74, 75, 86, 87 and Ex. 84, 85, 94), and the Village had reason to know that plaintiffs might have been willing to accept other public property for erection of their creche.[12] While these facts are revealing, we think they simply underscore what an examination of the debate on the creche issue by Village officials independently makes certain: the denial was content-based. We note finally that the denial could not be upheld as a time, place or manner restriction even if it were content-neutral because it was not issued pursuant to narrowly tailored regulations.[13] *See Neimotko v. Maryland*, 340 U.S. 268 (1951).

Our final inquiry, then, is whether the content-based denial of access to public land was "necessary to serve a compelling state interest." *Perry Education Association, supra*, at 955. Defendants argue the denial was necessary to serve a compelling state interest because to allow the erection of the creche on

12 One of the options the Village considered in dealing with the creche problem was to designate part of "Chase Park" (convenient to Boniface Circle) as "Heritage Plaza." The Heritage Plaza concept was to create a forum for religious, patriotic, ethnic and other social activities by transferring Village-owned land to a private entity. The Creche Committee stated it was in favor of the proposal and, in particular, approved "of displaying the creche at Chase Park because it is centrally located and accessible to pedestrians." (Stip. 34.) Thus, the Village was on notice that, even without creating a Heritage Plaza, the Creche Committee might have been willing to display the Creche at Chase Park. The Village also had reason to know that "Depot Plaza" would have been an acceptable alternative site. *See* Curran dep. at 8-10.

13 This not to say that content-neutral time, place or manner restrictions might not have been developed which could have justified the denial. *See, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) ("The nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place and manner that are reasonable' "). Assuming the Village could develop valid time, place and manner regulations, having the effect of barring the erection of symbols in Scarsdale's parks, it is clear, of course, that such restrictions could not be tailored to bar only the erection of religious symbols. Content-neutrality would require that the Community Fund Rocketship, the Red Cross cross and likely any other three-dimensional object would also be prohibited.

public property would violate the Establishment Clause of the First Amendment, applicable to the states through the Fourteenth Amendment, which dictates in general terms that there be no "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz v. Tax Commission of the City of New York*, 397 U.S. 664, 668 (1970). Because we find that allowance of the creche would contravene the Establishment Clause, we agree with defendants that the denial was proper and necessary.

We have no difficulty in finding that the creche is, in essence, a religious symbol. It depicts the birth of Jesus Christ, an event which had obvious and profound religious importance to adherents of Christian faiths. Plaintiffs, while asserting that the creche also imparts secular messages such as peace and goodwill, do not contend otherwise. The Creche Committee's complaint concedes the creche is a "religious symbol," Creche Comm. Complaint ¶ 18, and the Citizens Group's complaint admits that "the purpose of the display . . . was to celebrate and express religious convictions." Citizens Group Complaint ¶ 16. Indeed, the latter complaint suggests that a goal of displaying the creche at Boniface Circle was to give a more decidedly religious cast to the Village's celebration of Christmas. The relevant portion states:

> The plaintiffs also represent . . . that among the purposes of the display of the Creche are their desires to join in the Village's celebration of "Christmas" by giving recognition to the birth of Jesus Christ, the occasion and namesake of the holiday, and to celebrate and express religious convictions.

Id at ¶ 18. *See also* Ex. 3 (original application to put creche at Boniface Circle because creche symbolizes "the real significance of Christmas Time".)

Conceding the religiousness of the creche, plaintiffs argue that the Establishment Clause is not implicated in this case because the Village's mere allowance of access to a public forum for the dissemination of religious views does not constitute sponsorship or support of religious activity.[14] We find that the resolution of this issue depends on whether *Widmar v. Vincent*, 454 U.S. 263 (1982) is directly controlling.

In *Widmar*, the University of Missouri had encouraged student groups to use its facilities to conduct meetings. In so doing, the Court found, the university had created a limited public forum and could not, without "a compelling state interest," bar groups from using its facilities because of the content of speakers' views. *Id.* at 270. Like defendants here, the university argued that its exclusion of religious groups did serve a compelling state interest because to allow them access would violate the Establishment Clause. The Court agreed that avoiding an Establishment Clause violation would constitute a compelling state interest, *id.* at 271, but applying the familiar three-prong test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) for determining Establishment Clause infractions[15] the Court found that the Establishment Clause did not justify the exclusion. First, the Court held, allowing access to a public forum in a nondiscriminatory way would constitute a "secular purpose," thus satisfying the first prong of *Lemon*. *Id.* at 271-72 & n.10. Second, the Court found no "entanglement" with religion since "the University would risk greater 'entanglement' by attempting to enforce its exclusion" insofar as it would have "to determine which words and activities" fell within the proscribed classification of speech. *Id.* at 272 n.11. Finally, the Court concluded, by opening its forum "to all

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14 Plaintiffs make no argument, for example, that the creche is permissible because it is part of a larger celebration which is secular in nature, *cf. Donnelly v. Lynch*, 525 F. Supp. 1150 (D.R.I. 1981), *aff'd*, 691 F.2d 1029 (1st Cir. 1982), *cert. granted*, 103 S. Ct. 1766 (1983), or because Christmas may be celebrated with state support even in religious ways. *Cf. Donnelly v. Lynch*, 691 F.2d 1029, 1037-39 (1st Cir. 1982) (Campbell, J., dissenting), *cert. granted*, 103 S. Ct. 1766 (1982).

15 Under *Lemon*, a governmental policy will not offend the Establishment Clause if it can pass a three-pronged test: "First, the [policy] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the [policy] must not foster 'an excessive government entanglement with religion.' "

forms of discourse," the University would not be "advancing" religion. *Id.* at 273. With respect to the advancement of religion, the Court found "that any religious benefits of an open forum would be 'incidental,' " and it noted two factors which it deemed particularly persuasive. *Id.* at 274. The first was that an open forum for discourse did "not confer any imprimatur of State approval on religious sects or practices." *Id.* The second was that because "a broad class of nonreligious as well as religious speakers" numbering "over 100" were represented among the student groups, the open forum policy had an equally broad and secular effect. *Id.* The Court summed up by observing that "[i]f the Establishment Clause barred the extension of general benefits to religious groups, 'a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair.' " *Id.* at 274-75 (citations omitted).

In assessing the proper precedential weight *Widmar* should be read to have in the instant case we are mindful that

> There are always risks in treating criteria discussed by the Court from time to time as "test" in any limiting sense of that term. Constitutional adjudication does not lend itself to the absolutes of the physical sciences or mathematics. The standards should rather be viewed as guidelines with which to identify instances in which the objectives of the Religion Clauses have been impaired.

Tilton v. Richardson, 403 U.S. 672, 678 (1971). Accordingly, it has been noted that the delicate task of construing Free Exercise and Establishment Clause law requires close attention to the "sensitive issues of fact, and . . . to the particular circumstances" involved. *Brandon v. Board of Education*, 635 F.2d 971, 973 (2d Cir. 1980), *cert. denied*, 454 U.S. 1183 (1981). *Widmar* itself cautioned that its holding derived from a particular factual "context," *Widmar v. Vincent*, 454 U.S. at 273, and was limited "to the case before us." *Id.* at 276. The *Widmar* opinion concludes by observing, "The basis for our decision is narrow." *Id.* at 277. Our job then, is to make careful observations as to the similarities and differences between the facts of *Widmar* and those before us.

In holding that the Establishment Clause would not be violated on the facts before it, the *Widmar* Court addressed a factual situation in which 1) religious speech was to take place at "group[] meeting[s]" and consist of "discourse" by "speakers," *id.* at 273, 274 & n.14, and 2) the forum in which the speech would occur would be university facilities, presumably classrooms and meeting rooms, so that the community within which the forum existed was comprised of "young adults . . . able to appreciate that the University's policy is one of neutrality toward religion." *Id.* at 274 n.14. In contrast, the instant case involves 1) religious speech in the form of a physical structure which for ten to fourteen days is to convey its adherents' message, twenty-four hours a day, even in their absence, and 2) is to do so in a public park visited by persons "of all stripes," clearly including children.[16] With these factual differences in mind, we conclude that *Widmar* is controlling on the "purpose" prong of the *Lemon* test, is somewhat controlling on the "entanglement" prong, and is not controlling on the "primary effect of advancement" prong.

Widmar makes clear that in a case in which access to a public forum is sought for the purpose of engaging in religious speech, the purpose which should be attributed to the state in allowing the speech is the secular one of providing equal access to the public forum. *Widmar v. Vincent*, 454 U.S. at 272-73 & n.10. Accordingly we find that allowing the creche would not violate the Establishment Clause for want of a secular purpose.

The entanglement issues are more complex than in *Widmar*, but they do not tilt so clearly in one direction that allowance of

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16 Although there is little direct testimony on this point, the record makes plain that children have viewed the creche at Boniface Circle. First Boniface Circle's proximity to the business district filled with stores and professional offices, makes plain children would have opportunities to view the creche. A number of letters regarding the creche were written by people who said they grew up viewing it as a Village "tradition" *(see, e.g.*, Ex. 82), and some letters expressing a view, were written by children themselves, or by "families." One letter printed in the *Scarsdale Inquirer* in 1976 stated, "Although I'm only 13 I feel the creche, a deeply religious symbol does not promote 'good will.' I am Jewish: my menorah lights will burn in my home. I like to think Boniface Circle belongs to all Scarsdalians." (Ex. 62).

the creche could be found to violate the Establishment Clause on this ground alone. What was said in *Widmar,* that enforcing the exclusion would involve some entanglement in the sphere of religion, is equally true here. In order for the Village to bar religious symbols from public property, the Village would have to determine which symbols were "religious." On the other hand, insofar as governments already must make such determinations to keep religious signs and symbols off public buildings, *see, e.g., Stone v. Graham,* 449 U.S. 39 (1980) (per curiam); *Goldstein v. Fire Department of Suffern,* 559 F. Supp. 1389 (S.D.N.Y. 1983); *Fox v. City of Los Angeles,* 587 P.2d 663 (Cal. Sup. Ct. 1978), to avoid spending money on their creation or display, *see, e.g., Gilfillan v. City of Philadelphia,* 637 F.2d 924 (3d Cir. 1980), *cert. denied,* 451 U.S. 987 (1981); *Donnelly v. Lynch,* 525 F. Supp. 1150 (D.R.I. 1981), *aff'd.,* 691 F.2d 1029 (1st Cir. 1982), *cert. granted,* 103 S. Ct. 1766 (1983), and to avoid their permanent placement on public land, *see, e.g., ACLU v. Rabun County Chamber of Commerce,* 510 F. Supp. 886 (N.D. Ga. 1981), *aff'd,* 678 F.2d 1379 (11th Cir. 1982), *op. modified,* 698 F.2d 1098 (11th Cir. 1983); *Lowe v. City of Eugene,* 451 P.2d 117 (Or. Sup. Ct.), *op. withdrawn,* 459 P.2d 222, *rehearing denied,* 463 P.2d 360 (1969), *vacated,* 558 P.2d 338 (1976), *cert. denied,* 397 U.S. 1042 (1970), having to make such determinations with regard to shorter term displays in public forums does not seem to add much to their burden.

If a free speech right to display religious symbols in public parks were judicially recognized—a fact not assumed in the Village of Scarsdale—and applications to display religious symbols thereby increased, we think the type of entanglement associated with fairly making available scarce time and space could be a problem. Neutral time, place and manner regulations would help, but the situation would appear ripe for "lurking doubts about favoritism." *Lehman v. City of Shaker Heights,* 418 U.S. 298, 304 (1974).

The record does indicate the existence of a "divisive political potential" over the creche issue, another aspect of entanglement. *Lemon v. Kurtzman,* 403 U.S. 602, 622 (1971). Clearly

the issue has created division in the community, and it is also true that some candidates for the board have run, with little success, taking stands on the creche. However, a result in this lawsuit, one way or the other, would seemingly leave little to future political debate, and accordingly we do not see the divisiveness element as contributing much to entanglement. In sum, while allowing the creche does generate some entangelement potential, this potential is not enough, in our opinion, to constitute an Establishment Clause violation.

It is with respect to the "primary effect of advancing religion" prong of *Lemon* that the instant case differs most from *Widmar.* As noted, *Widmar* found no improper advancement of religion when the role of state authority was limited to making its property available in a nondiscriminatory way so that students could gather to exchange and express religious ideas. Other cases similarly support the conclusion that where assembly and religious expression are contemporaneous, merely allowing speakers to speak from public property does not have the primary effect of advancing religion. *See, e.g., Fowler v. Rhode Island,* 345 U.S. 67 (1953); *Brandon v. Board of Education,* 635 F.2d 971, 978 (2d Cir. 1980), *cert. denied,* 454 U.S. 1123 (1981); *O'Hair v. Andrus,* 613 F.2d 931, 934-35 (D.C. Cir. 1979). Thus, if plaintiffs had sought to hold a religious rally, conduct a sermon, leaflet, or otherwise personally engage in expressive conduct, we would have little doubt that the proposed activity would, under the protection of the Free Speech Clause, run free and clear of the Establishment Clause.

But this conclusion does not lead inexorably to the additional conclusion that *all* forms of religious expression will be entitled to the same protection or will be held just as permissible as comparable secular forms of speech might be.[17] Al-

17 We have little doubt, for example, that the Village could permit the Community Fund rocketship to sit on Boniface Circle forever, if the Village so wished. On the other hand, we would almost certainly have to reach a different conclusion if it wanted to permit a permanent altar of some kind. *Cf. Tilton v. Richardson,* 403 U.S. 672 (1971) (conversion of property paid for by government for secular purposes permissible, but conversion for

though we are aware of no cases which squarely address this issue, we think it a sound proposition that, as is true with any other religious activity, to the extent religious speech sufficiently relies to effect its purpose on the "prestige, power and influence of [the state]," *Abington School District v. Schempp,* 374 U.S. 203, 307 (1963) (Goldberg, J., concurring), it will implicate the state in the advancement of religion in violation of the Establishment Clause. Accordingly, we must decide if the manner chosen by the plaintiffs to convey their religious message sufficiently relies on the "prestige, power and influence" of the Village to constitute an impermissible state advancement of religion.

To decide this question, we consider that the "primary effect of advancing religion" prong of Establishment Clause analysis is concerned with state action which has "the direct and immediate effect of advancing religion," *Committee for Public Education v. Nyquist,* 413 U.S. 756, 783-84 n.39 (1973), and is likewise unconcerned with effects which provide only " 'indirect,' 'remote,' or 'incidental' benefit." *Id.* at 771. *See Widmar v. Vincent,* 454 U.S. at 273. On the other hand, government need spend no money to advance religion in violation of the Establishment Clause. *See Stone v. Graham,* 449 U.S. 39 (1980) (per curiam). The "cases recognize that government sponsorship of religious beliefs can occur in ways far more subtle than endowing state churches or mandating acceptance of certain religious rites or tenets." *Donnelly v. Lynch,* 525 F. Supp. 1150, 1175 (D.R.I. 1981), *aff'd,* 691 F.2d 1029 (1st Cir. 1982), *cert. granted,* 103 S. Ct. 1766 (1983). Indeed, "the mere *appearance* of a joint exercise of . . . authority by Church and State provides a significant symbolic benefit to religion" and therefore may impermissibly advance religion. *Larkin v. Grendel's Den, Inc.,* 103 S. Ct. 505, 511 (1982) (emphasis added). *See also Stone v. Graham,* 449 U.S. 39, 42 (1980) (per curiam); *Brandon v. Board of Education,* 635 F.2d 971, 979 (2d Cir. 1980), *cert. denied,* 454 U.S. 1123

religous purposes violates Establishment Clause). *See also, ACLU v. Rabun County Chamber of Commerce,* 510 F. Supp. 886 (N.D. Ga. 1981), *aff'd,* 678 F.2d 1379 (11th Cir. 1982).

(1981). Thus, the State must make sure that its "efforts to perform a secular task . . . [do] not lead it into such an intimate relationship with religious authority that it appears . . . to be sponsoring that authority." *Roemer v. Maryland Public Works Board,* 426 U.S. 736, 747-48 (1976).

Guided by these principles, we find that allowing plaintiffs' creche to stand for ten or so days at Boniface Circle would have the direct and immediate effect of advancing religion in two related ways. First, in contrast to cases like *Widmar* where speech derives from the simultaneous efforts and actions of those who have gathered to engage in it, when a symbol is placed on public land the land performs an added and enhanced *function.* No longer is the land just a place from which a message can be proclaimed; when a symbol is left on public land the land actually becomes the message bearer. This means that public resources are substituted for personal conduct as a way of generating the speech. Thus, for example, even if the persons on whose behalf the symbol speaks its religious message were to eschew the cold of Scarsdale and choose instead to winter down south, the message would still be proclaimed because public property would be there to carry that message.[18] Ours is not a case, therefore, where "government . . . lets each [religious group] flourish according to the zeal of its adherents," *Zorach v. Clauson,* 343 U.S. 306, 313 (1952); when public property becomes the message bearer, government allows religion to flourish in a way which bears no necessary relation to the zeal of its adherents. Thus, state resources are relied upon and used to advance religion in a way

18 We need not assume the most egregious case to perceive the validity of the point. Undoubtedly, during a continuous ten day period there would be many occasions on which the persons on whose behalf a religious symbol speaks would be at home, at work or otherwise occupied. The message, of course, would be proclaimed nevertheless. This reality is particularly laid bare by the concession of one of the individual plaintiffs that during his six or seven years as a resident of Scarsdale, he never once made a trip downtown just to see the Village creche, and that he only noticed its presence in two or three of those years; this despite his "strong" and "deep" conviction that a creche be displayed at Boniface Circle. Butler dep. at 22-29, 90.

which "cannot realistically be termed simply accommodation." *Abington School District v. Schempp*, 374 U.S. 203, 307 (1963) (Goldberg, J., concurring).

The second way in which permitting the creche for ten days would advance religion is closely related. Because when a symbol is implanted on public land that land uniquely becomes the message bearer, and because, concomitantly, there are no persons present to whom the receiver of the religious message can attribute the speech, the possibility that those receiving the message will assume it is supported by the state is particularly present.

The record discloses in two ways that the appearance of state support, brought about when symbols are erected and left on public property, is an actual and not merely a theoretical problem. The first relates to the fact that other forms of religious expression, although occurring on public property, have not, in stark contrast to the creche display, generated much if any complaint. The Village, for example, has routinely and for many years allowed local churches to hold picnics in its parks and block parties in its streets (Stip. 72). It has permitted Wayside Cottage, a publicly owned historical building, to be used for religious services and celebrations (Stip. 67). It has allowed its streets and parks to be used to publicize and raise money for religiously sponsored and affiliated philanthropies (Stip. 85, 96-97). And it has allowed members of the clergy to say prayers and give benedictions on public property at Memorial Day gatherings and at the annual Christmas Carol Sing (Stip. 64, 79). Unlike the creche, none of these uses has generated letters protesting that the Village's streets and parks belong to "all of the people," nor forced the board to ponder the question of whether its decision to allow the use would *in fact* be supporting religion. The record suggests that, in contrast to public gathering uses, people have objected to the creche precisely because an aura of Village approval has adhered to it.[19] Removing this aura of Village approval was the

19 People have *defended* it for exactly the same reason, arguing that the creche should be allowed to remain because it is a "Village" or "Scarsdale" tradition.

primary concern of the members of Scarsdale's clergy who offered their church properties on an annually rotating basis for display of the creche.

Indeed, cultivating an aura of Village approval is, in our view, one of the factors fueling plaintiffs' desire to have the creche on public property. This is the second way in which the record suggests that the appearance issue is more concrete than theoretical. The Creche Committee has conceded, through its chairperson, that among its reasons for wishing to display the creche at Boniface Circle is a desire to enhance the creche's merely religious message with an "ecumenical aspect." *See* Curran dep. at 54-56. We have already noted that, on the record before us, this reason appears to be a dominant one. Imbuing the creche with an ecumenical appearance or the appearance that the symbol speaks a "worldwide, general, or universal" message, *Webster's Third New International Dictionary* (unabridged ed. 1971), would seem to occur *only* if Village land—the property of "all the people"—is in fact linked in the receiver's mind with the message, since there is nothing inherently ecumenical about the creche standing alone. The likelihood of a mental linkage between the message and the property owner's identity is the stated reason why the Creche Committee believes that the "ecumenical aspect" of the creche's message would be destroyed if the creche were displayed on church property. Curran dep. at 54-56. However unsatisfactory the alternatives may be,[20] the problem with attempting to create an "ecumenical aspect" by placing the creche on public property is that the creche does *not* speak for all the people. More fundamentally, since allowing the creche also permits it to gain the false appearance of speaking for all

20 Those who believe in the religious message of the creche could gather together on public property to proclaim it, have everyone who agrees with the message personally display creches on their own property, or have all of their churches, as a number of Scarsdale churches now do, display a creche. Each of these alternatives would allow the message to be proclaimed in an ecumenical way. Moreover, each would ensure that the scope of the ecumenical expression would not, at the expense of nonbelievers, appear broader than in reality it is.

of Scarsdale's residents, allowing the creche advances religion in violation of the Establishment Clause. In contrast to *Widmar*, not only does there appear to be an "imprimatur of State approval" when the creche sits at Boniface Circle; plaintiffs' actually seek it.

We note, too, that factors militating against the appearance of state support in *Widmar*, are absent here. First the community viewing the creche includes children who cannot be counted on to "appreciate that the [Village's] policy is one of neutrality toward religion." *Widmar, supra*, 454 U.S. at 274 n.14. Second, we cannot say on the record before us that "a broad class of nonreligious as well as religious" symbols, *id.* at 273, will abound in Scarsdale's parks thus minimizing the appearance of state support. Symbols in public parks are relatively rare, and it appears that only one religious symbol has been offered for display in Scarsdale's parks for as far back as anyone can recall. Whether a decision squarely holding that such symbols are permissible would encourage other religious adherents to display symbols is not clear—the record indicates that many feel it is inappropriate to display religious symbols on public property for moral and theological reasons, and that some might be reluctant to erect displays out of fear of generating animosity toward their religion.[21] Ironically, though, while a multiplicity of religous symbols on public property might lessen the appearance of state support for any or all, it would seem to increase the dangers discussed above with regard to public property performing a functional role as the message bearer, and would also increase the problems of entanglement. We note, finally, that even if privately funded and erected religious symbols became commonplace, the "lurking doubts" of state support would likely not be completely dispelled. History is simply too replete with the examples of government impermissibly seeking to bolster religion through the erection of signs and symbols to permit it. *See, e.g., Stone*

21 On this latter point, *see Fox v. City of Los Angeles*, 587 P.2d 663, 666 (Cal. Sup. Ct. 1978) ("there may be complex and troubling reasons why residents who are non-Christian [will choose] not to seek 'equal recognition and aid' ").

v. Graham, supra; *Gilfillan v. City of Philadelphia*, 637 F.2d 924 (3d Cir. 1980), *cert. denied*, 451 U.S. 987 (1981); *Goldstein v. Fire Department of Suffern*, 559 F. Supp. 1389 (S.D.N.Y. 1983); *Donnelly v. Lynch* 525 F. Supp. 1150 (D.R.I. 1981), *aff'd*, 691 F.2d 1029 (1st Cir. 1982), *cert. granted*, 103 S. Ct. 1766 (1983); *ACLU v. Rabun County Chamber of Commerce*, 510 F. Supp. 886 (N.D. Ga. 1981), *aff'd*, 678 F.2d 1379(11th Cir. 1982), *op. modified*, 698 F.2d 1098 (11th Cir. 1983); *Fox v. City of Los Angeles*, 587 P.2d 663 (Cal. Sup. Ct. 1978); *Lowe v. City of Eugene*, 451 P.2d 117 (Or. Sup. Ct.), *op. withdrawn*, 459 P.2d 222, *rehearing denied*, 463 P.2d 360 (1969), *vacated*, 558 P.2d 338 (1976), *cert. denied*, 397 U.S. 1042 (1970).

The advancement problems are not cured by the placement of a sign next to the creche. First, a sign does not solve the problem of public land taking over the function of message bearer from adherents. Second, it is doubtful that a sign saying that a symbol has been "erected and maintained" by a private group will entirely eliminate the appearance of state support when public land is still the one visible thing to which the speech may be attributed. The Creche Committee was not sure that a sign would prevent its ecumenical message from being "destroyed" if the creche were displayed on church property, *see* Curran dep. at 56-57, and the record suggests, for reasons already stated, Scarsdalians continued to perceive that "aura of Village support" long after the Creche Committee began posting a sign in 1976. *Cf. Stone v. Graham*, 449 U.S. 39 (1980) (per curiam) (posting of notation under religious symbol did not avoid Establishment Clause violation.

We think, too, that if cases such as this were to turn on minutiae like the visibility or lack of ambiguity of disclaiming signs, *see Allen v. Morton*, 495 F.2d 65,89 (D.C. Cir. 1973) (Leventhal, J., concurring), the size or relative size of the symbol, the length of time for the display, or the potentially myriad other factors which possibly could be held to affect the outcome, the *courts* would become hopelessly entangled in the problem, and, perhaps more importantly, villages like Scarsdale would endlessly be in and out court.

Acknowledging that "we can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication," *Tilton v. Richardson*, 403 U.S. 672, 678 (1971), we nevertheless look in this case of novel impression for a clear rule of decision which strikes at the "common sense of the matter," *Zorach v. Clauson*, 343 U.S. 306, 312 (1952). That rule, we think, is suggested by the approach former Mayor Stone took in making the obviously personally difficult decision to vote against the creche after having previously voted for it. The Mayor, a Christian, a non-lawyer, and someone who maintains a creche in her own home, Stone dep. at 48, was persuaded to vote against allowing the creche when she began to consider that private property was available for symbolic religious displays and that there was a difference between "a 'speaking' use" of public property for the dissemination of religious ideas and the erection of symbols to effect such a purpose. In her words, the creche was different because "the placement of the Creche in the center of the village . . . is more permanent, it is a solid seeable religious artifact . . . and you see it there in the heart of Scarsdale on village property like the village is supporting it." *Id.* at 18-19.

We hold that because the creche would be erected 1) for a time period not essentially contemporaneous with assembly, 2) in a public park visited by persons of "all stripes," and 3) not as part of an event having an overriding secular effect, *compare Allen v. Morton*, 495 F.2d 65 (D.C. Cir. 1973), and *Donnelly v. Lynch*, 525 F. Supp. 1150 (D.R.I. 1981), *aff'd*, 691 F.2d 1029 (1st Cir. 1982), *cert. granted*, 103 S. Ct. 1766 (1983), it was proper for the Village to deny plaintiffs' applications in order to avoid contravening the Establishment Clause. Insofar as the Village's denials of access to plaintiffs have been consistent with and no broader than this holding, we also find that they have been sufficiently "narrow" to justify a denial of free speech access. *See Perry, supra*, 103 S. Ct. at 955. Were we to accept that displaying a creche on public property constituted a practice of plaintiffs' religion, we would reach the same conclusion with respect to their free exercise claims. The Creche Committee has not pressed its equal protection argument, but we think our holding is dispositive of that claim as well.

CONCLUSION

It may be that the line we have drawn in this case could have been drawn through some slightly different point on the continuum of factual degrees. But we consider that "[t]he Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn." *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971). The line we have drawn allows persons with religious views unfettered freedom to come onto public forum property to *personally* speak those views. We also think it would give them the unimpeded right, subject of course to reasonable time, place and manner restrictions, to bring religious symbols with them. *See O'Hair v. Andrus*, 613 F.2d 931, 933 (D.C. Cir. 1979) (papal mass in public park including display of "alter [sic] and other accouterments connected with the mass" did not violate Establishment Clause). Our holding leaves untouched the certain right, well practiced in Scarsdale, of persons with religious views to maintain symbols on private property around the clock and for as long as they wish. And, we think, it draws a boundary which does not question the right of religion to receive "general [governmental] benefits," *see Widmar v. Vincent*, 454 U.S. at 274, but which does allow government not to be "joined" in the promotion of religion. Finally, our holding provides at least some degree of predictability for all concerned.

The judgment is for defendants in all respects.

SO ORDERED.

CHARLES E. STEWART, JR.
United States District Judge

Dated: New York, New York
December 8, 1983